IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- **77-1826**

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Kaiser Aluminum & Chemical Corporation ("Kaiser") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) has not yet been reported. That opinion reversed a judgment of the United States District Court for the District of Delaware, which was accompanied by an opinion (Appendix C) which is reported at 428 F. Supp. 177. A prior opinion of the District Court in the case (Appendix D) is reported at 414 F. Supp. 1047.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered on March 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did Congress give the Consumer Product Safety Commission the power to regulate as "consumer products" either housing or integral parts of home structures, and thus to preempt existing state and local regulation of housing safety matters?

STATUTORY PROVISION INVOLVED

Section 3(a) of the Consumer Product Safety Act, as amended ("CPSA" or "Act"), 15 U.S.C. § 2052(a), provides, in pertinent part:

> "For purposes of this chapter:
>
> "(1) The term 'consumer product' means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise. . . ."

The full text of Section 3(a) is reproduced in Appendix E.

STATEMENT

In its decision below, the Third Circuit in effect sustained the claim of the Consumer Product Safety Commission ("Commission" or "CPSC") that it possesses authority to regulate as "consumer products" all building

materials used in the construction of residential structures. Although the court below purported to recognize Congress' intention to deny the Commission such authority over residential buildings as a whole (App. A at 5a), it accepted the Commission's arguments that it could regulate both the design and the performance of all "components" of such buildings (App. A at 8a-9a), including the building materials used during the construction process. In so doing, the Court of Appeals supported its reading of the CPSA's language by dismissing as "inconclusive at best" the legislative history (App. A at 10a), which demonstrates that Congress intended to leave untouched the existing state and local system of regulating housing safety through building codes, licensing, and inspections. Instead, the court held that CPSC jurisdiction was justifiable because "design and performance standards for [residential building] components are now a matter of national concern" (App. A at 8a-9a).

This conclusion misreads both the legislative intent underlying the CPSA and the plain language of the statute. The Court of Appeals' ruling, if left undisturbed, will lead to a piecemeal dismemberment of the comprehensive system of state and local control over the design and construction of housing—a system with deep historical roots that Congress has repeatedly sustained [1]—and its replacement by a "consumer product" agency with no expertise in housing matters. Moreover, the decision threatens to impose billions of dollars in liabilities upon home builders and manufacturers of building materials for the retroactive "recall" of housing elements that complied with all applicable state and local building codes in effect at the time the structures were built. Accordingly, prompt review by this Court is necessary to prevent the costly disruption of a long-standing system of state and local regulation.

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[1] *See infra* at 10-13.

The Proceedings Below

This case arises out of the CPSC's assertion of jurisdiction over one important element of the home structure: its "branch circuit" electrical wiring system. Branch circuit wire is made of either aluminum or copper and is used to connect the circuit breakers or fuse boxes to the outlets, switches, or other electrical devices through which electricity is supplied to the home. During the process of home construction, electrical contractors first string the wire within the walls, ceilings, or floors and then connect it to electrical devices, thus creating the branch circuit wiring system. When complete, the electrical system constitutes an integral part of the home structure, much like the floor or the roof (App. A at 3a).

Late in 1973, the CPSC began an investigation of alleged fire hazards associated with certain aluminum branch circuit wiring systems. After the CPSC embarked upon a publicity campaign concerning these alleged hazards,[2] Kaiser—one of several manufacturers of aluminum branch circuit wire[3]—unsuccessfully attempted to convince the Commission that the CPSC's publications were inaccurate, unfair, and seriously damaging to Kaiser's business. In January 1976, Kaiser brought suit against the Commission in the United States District Court for the District of Delaware, invoking federal jurisdiction under 28 U.S.C. §§ 1331(a) and 1337. The action sought to force the Commission to comply with Section 6 of the CPSA, 15 U.S.C. § 2055, which imposes a series of procedural and substantive requirements controlling the CPSC's disclosure of information to the public.

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[2] In its campaign, the CPSC alleged that a fire hazard may arise at the connections between the wire and electrical devices in certain types of aluminum wiring systems (App. D at 3d-7d).

[3] Kaiser neither manufactures nor sells electrical devices, nor does it act as an electrical contractor.

In addition to requesting other types of relief, Kaiser sought to enjoin the Commission's release of information relating to aluminum branch circuit wiring systems. Kaiser contended, *inter alia*, that aluminum wiring systems are not "consumer products" as that term is defined in Section 3(a)(1) of the Act, 15 U.S.C. § 2052(a)(1), and that the Commission thus lacks jurisdiction either to regulate them or to conduct publicity campaigns concerning them. On a motion for preliminary relief, the District Court found that Kaiser had demonstrated a reasonable probability of success on its claim that the Commission lacks jurisdiction over aluminum branch circuit wiring. 414 F. Supp. 1047 (App. D at 1d). After a trial of the jurisdictional issue, the District Court held that aluminum branch circuit wiring is not a "consumer product" under Section 3(a)(1) of the Act, 428 F. Supp. 177 (App. C at 1c), and granted Kaiser appropriate declaratory and permanent injunctive relief.

The Commission appealed, and on March 27, 1978, the United States Court of Appeals for the Third Circuit reversed (App. A at 1a). It is that judgment which Kaiser asks this Court to review.

REASONS FOR GRANTING THE WRIT

A. Certiorari Should Be Granted to Decide an Important Question of Federalism Arising from the Consumer Product Safety Commission's Attempt to Displace State and Local Governments from Their Traditional Role in Regulating Housing Safety.

Housing and building materials have long been subject to a comprehensive system of state and local regulation covering both design and construction.[4] As the court below necessarily conceded, the electrical wiring system

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[4] *See, e.g.*, R. SANDERSON, CODES AND CODE ADMINISTRATION 5-36 (1969); NATIONAL ELECTRICAL CODE (1978 ed.).

is an integral part of the house (App. A at 3a). If the CPSA confers jurisdiction on the Commission to regulate such matters, then Commission standards will preempt all relevant state and local codes.[5] The Third Circuit welcomed this prospect, claiming that design and performance standards for housing "are now a matter of national concern" (App. A at 8a-9a).

This conclusion that the federal government should regulate housing safety is not supported by the relevant legislative materials and is far from obvious as a matter of national policy. Both the expertise and the wide-ranging inspection capability necessary for such a regulatory program currently reside not in the federal establishment, but in state and local governments; the CPSC has admitted that it cannot provide an effective substitute for the state and local enforcement system.[6] Moreover, even if federal intrusion did make sense, the CPSC would hardly be the instrument chosen by Congress, for much greater expertise in the housing area is already available in other federal agencies, such as the Department of Housing and Urban Development ("HUD"). The fact of the matter, however, is that Congress did not claim for the federal government in general, or grant to the Commission in particular, the authority over housing safety that the agency is now attempting to seize.

The decisions of this Court require Congress to speak clearly if it wishes to preempt a comprehensive state regulatory system:

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States* v. *Bass*, 404 U.S. 336, 349 (1971) (footnote omitted).[7]

[5] Section 26(a) of the CPSA, 15 U.S.C. § 2075(a), expressly provides that whenever the Commission issues a safety standard that "applies to a risk of injury associated with a consumer product," the CPSC standard will preempt any state or local standard or regulation dealing with the "same risk of injury" (App. A at 8a).

[6] 42 Fed. Reg. 3342 (1977).

It is obvious that the Third Circuit's ruling will work a significant alteration of the federal-state balance in the field of housing regulation. Neither the legislative history of the CPSA, nor the consistent course of Congressional action in the housing safety area, nor the statutory language sanctions such a result.

The Legislative History of the CPSA

The legislative history of the CPSA demonstrates that Congress considered the possibility of authorizing the Commission to regulate housing and the integral parts of home structures, and decisively rejected that course of action. During Congress' deliberations on the CPSA, only once was it suggested that the Act was an appropriate vehicle in which to deal with the complex problems that would necessarily be raised by federal intrusion into the housing safety area.[8] The occasion arose when Senator Eagleton proposed an amendment that would have included mobile homes—and thus their electrical wiring

[7] *See also Ray* v. *Atlantic Richfield Co.*, —— U.S. ——, 98 S. Ct. 988, 994 (1978); *Heublein* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 281-82 (1972).

[8] *See* 118 CONG. REC. 21,898 (1972). The otherwise complete silence of Congress on the question of federal entry into the area of state and local building regulation is itself persuasive evidence that Congress did not intend to use the CPSA as a vehicle through which to involve the federal government in that extremely complex subject. Any legislation defining such a federal presence would require careful drafting to delineate the relationship between the state and local system and any new federal rules.

systems—within the definition of "consumer product." This proposed amendment sparked a lengthy debate, the thrust of which was that mobile homes were a type of housing, and therefore were not "consumer products." At the conclusion of the debate, the Senate formally affirmed this view by voting down Senator Eagleton's proposal.

The Senate regarded the distinction between housing and "consumer products" as critical, in part because housing safety legislation falls under the jurisdiction of the Senate subcommittee specifically charged with developing all types of housing legislation, and that subcommittee had not reviewed the CPSA. The housing subcommittee, in fact, was then considering legislation to deal with mobile home safety in the broader context of legislation giving certain powers and duties to HUD.[9] Accordingly, several Senators indicated that any regulatory authority over mobile homes should be given to HUD under the pending housing bill, since expertise on housing concerns existed there but would not exist within the proposed consumer product agency.[10]

It also became clear during the debate that the Senate simply did not conceive of mobile homes or other types of housing as "consumer products" to be regulated by the new CPSC. Thus, Senator Sparkman reasoned that if Congress were to extend the legislation to mobile homes, "[w]e might as well apply it to single-family dwellings or to apartment houses, or to anything else. . . ." [11] Even more explicit were the remarks of Senator Brock:

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[9] *See* the remarks of Senator Sparkman, Chairman of the Housing and Urban Affairs Subcommittee of the Senate Banking, Housing and Urban Affairs Committee. 118 CONG. REC. 21,898 (1972).

[10] *Id.* at 21,898-900.

[11] *Id.* at 21,898.

> "The fact of the matter is that the Senator's amendment tries to equate a waffle iron with a home. . . . A mobile home looks like a house, functions as a house. . . . [I]f this amendment were to be adopted the [CPSC] would be thrust into an area which relates solely to housing. . . .
>
> "If this amendment were adopted, mobile homes would be the only form of housing contained in this legislation." 118 CONG. REC. 21,899 (1972).

The Senate shared Senator Brock's concern and resoundingly defeated the Eagleton amendment by a vote of 63 to 16.[12]

The House of Representatives also expressed a clear intent to exclude mobile homes from regulation by the CPSC. In explaining this decision, the House Report stated that the definition of "consumer product" was not "so broadly stated as to bring the basic structure of the mobile home within the reach of this legislation." [13] Thus, both Houses of Congress made it clear that the new

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[12] Two years later, Congress did provide for federal regulation of mobile home construction. In the National Mobile Home Construction and Safety Standards Act of 1974, Pub. L. No. 93-383, 88 Stat. 700, 42 U.S.C. §§ 5401-5426, it assigned that regulatory role to HUD, and not to the CPSC. Significantly, the Mobile Home Act specifically includes "electrical systems" within its definition of "mobile home," 42 U.S.C. § 5402(6), thus distinguishing them from "consumer products" such as toasters and television sets.

[13] H.R. Rep. No. 1153, 92d Cong., 2d Sess. 28 (1972).

The Third Circuit's analysis of this legislative history was both extremely brief and predicated upon an erroneous factual premise. Thus, the Third Circuit minimized the importance of the debate on the Eagleton amendment on the ground that it preceded the House Report, which the Court of Appeals erroneously construed as favorable to the CPSC's position (App. A at 9a); in fact, the Senate debate occurred on June 21, 1972, the day *after* the issuance of the House Report. Moreover, as noted above, the House Report's conclusions are actually contrary to those of the Third Circuit.

"consumer product" agency was to have no authority over housing questions. As the District Court noted:

> "Cong ss, in considering the CPSA, seems to have contemplated that the Act would not, at least as a general proposition, preempt state and local building codes. The primary concern of Congress, in fact, appears to have been the filling of *gaps* in existing national/state regulation, rather than the supplanting of local regulation of housing design and construction." 414 F. Supp. at 1059-60 (App. D at 25d).

Federal Legislation Concerning Housing Safety

The legislative history of the CPSA, which carefully distinguishes between "consumer products" and the integral parts of a house, is consistent with Congress' general approach to legislation on housing safety matters. In a number of other recent statutes, Congress has decided to entrust housing to HUD, not the CPSC; to limit HUD to an advisory role, except in certain special situations (such as mobile homes) where federal preemption seems particularly sensible; and to distinguish between housing and "consumer products."[14] These statutes, which the Third Circuit did not discuss, graphically demonstrate the error in that court's unexplained conclusion that Congress gave the Commission the power to supplant state and local regulation of housing safety.

Soon after the CPSA was enacted, Congress passed the Housing and Community Development Act of 1974,[15] which established the National Institute of Building Sci-

[14] Of course, the CPSA's meaning must be examined in light of the language and objectives of other federal statutes that relate to the same general subject matter. *See, e.g., Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

[15] Pub. L. No. 93-383, 88 Stat. 633.

ences ("NIBS"). NIBS' jurisdiction expressly includes the safety aspects of building systems, products, and materials. 12 U.S.C. § 1701j-2(e). Unlike the CPSC, NIBS has no authority to set mandatory federal standards; rather, its role is to develop "nationally recognized performance criteria" for the construction industry, to encourage local authorities to adopt these criteria, and to furnish technical assistance to state and local jurisdictions. *Id.*[16] This policy of favoring an advisory, rather than a preemptive, federal role was further demonstrated that same year when Congress established the National Fire Prevention and Control Administration ("NFPCA").[17] The statute creating the NFPCA explicitly notes that "fire prevention and control is and should remain a State and local responsibility . . .," 15 U.S.C. § 2201(5),[18] and grants only an advisory role to the new federal agency. This deference to state and local regulatory authorities is reiterated throughout the statute, particularly in reference to local building codes. *See, e.g.*, 15 U.S.C. § 2211.[19]

[16] *See* 414 F. Supp. at 1061 (App. D at 27d).

[17] The NFPCA was established by the Federal Fire Prevention and Control Act of 1974, Pub. L. No. 93-498, 88 Stat. 1535, 15 U.S.C. §§ 2201-2219.

[18] As noted above, the alleged problem with aluminum wiring systems is that some systems may give rise to fire hazards under certain conditions.

[19] This policy is reaffirmed in pending legislation concerning the NFPCA. The proposed Fire Prevention Study Act of 1978, H.R. 7684, which has been favorably reported by two House committees, would require the NFPCA—and not the CPSC—to study the "necessity and feasibility of establishing a Federal assistance program to aid State and local governments in the enforcement of their fire prevention codes and/or Federal fire safety and control standards." H.R. Rep. No. 989, Part I, 95th Cong., 2d Sess. 1 (1978). As one committee report notes, however,

> "[a]lthough the bill directs the [NFPCA] to study the feasibility of a Federal fire prevention and control code . . . , the committee wishes to make clear that it is not suggesting that

Even more telling was the Congressional reaction when faced with a safety hazard—lead paint—that occurs in both housing and "consumer product" contexts. In the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4801-4846, Congress gave the CPSC responsibility for prohibiting the use of lead-based paint in "any toy or furniture article," but gave *HUD* the authority to prohibit the use of that substance in federally-constructed or assisted housing, and did not purport to give any federal agency the power to regulate lead paint with respect to housing lacking a federal financial nexus. 42 U.S.C. § 4831.

Finally, when Congress enacted the Magnuson-Moss Warranty Act of 1975, 15 U.S.C. §§ 2301-2312, it again distinguished between "consumer products" and structural housing components. During the debate on that legislation, Congressman Moss, a leading proponent of the CPSA, stated that the Warranty Act's definition of "consumer product":

> "would apply to any separate equipment such as heating and air conditioning systems which are sold with a new home. However, *the definition would not apply to items such as dry wall, pipes, or wiring which are not separate items of equipment but are rather integral component parts of a home.*" 120 CONG. REC. 31,323 (1974) (emphasis added).[20]

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such a code would be appropriate. In fact, the committee notes that some of the model codes, and thus the State and local codes which substantially adopt them, are satisfactory. . . . *In view of the traditionally State and local character of fire prevention and control, the committee hopes that Federal involvement in this field can be kept to a minimum.*"

Id. at 4-5 (emphasis added); *see also* H.R. Rep. No. 989, Part II, 95th Cong., 2d Sess. 4, 9 (1978).

[20] A Federal Trade Commission interpretation of the Magnuson-Moss Warranty Act adopts Congressman Moss' approach, stating that such items as "wiring, plumbing, ducts and other items which are integral component parts of the structure" are not "consumer products" covered by the Warranty Act. 41 Fed. Reg. 34,654 (1976). *See also* FTC Advisory Opinion No. 110, 3 CCH Trade Reg. Rep. ¶ 21,245, at 21,140 (1976).

Taken together, these four statutes reflect the long-standing, coherent Congressional policy against displacing the present state and local system of regulating housing design and construction, and give added meaning to the similar Congressional intent revealed by the legislative history of the CPSA.

The Plain Language of the CPSA

This intention is also readily discernible in the language Congress chose to include in the CPSA's definition of "consumer product," for that langauge in no way connotes "housing." Section 3(a)(1) of the Act, 15 U.S.C. 2052(a)(1), permits the Commission to regulate only those products that are: (1) "articles" which are (2) produced or distributed for "use" by a consumer; moreover, that use must (3) occur "in or around a . . . residence." In fact, housing and structural housing components have none of those characteristics.

Neither a house nor the electrical wiring system built into it can logically be called an "article" within the meaning of the Act.[21] When Congress discussed the CPSA, the floor debate made it clear that it intended the Commission to regulate products such as waffle irons or television sets, but not housing.[22] In order to effectuate that intention, Congress used the word "article," a word with a broad, but not a universal, colloquial meaning. One simply would not refer to one's home or home wiring

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[21] *Cf. The Conqueror,* 166 U.S. 110, 115-16 (1897) (construing the word "article").

[22] *See* 118 CONG. REC. 21,845, 21,898-901 (1972); *see also* S. Rep. No. 749, 92d Cong., 2d Sess. 14-15 (1972); H.R. Rep. No. 1153, 92d Cong., 2d Sess. 23 (1972).

system as an "article." Moreover, it makes no sense to say that someone "uses" an integral part of a house "in or around" the house, for one cannot "use" one's house "around" or "inside of" itself.

In its quest to maximize its regulatory jurisdiction, however, the Commission has interpreted the word "article" as a description of the universe of things, and has virtually ignored the rest of the statutory definition.[23] In accordance with its loose reading of the statute, the Commission has asserted that architectural glass, wall board, and even *roofs* are all "articles" and "consumer products" which it may regulate.[24] The Commission has even claimed that a house is an "article," [25] although the agency has not yet claimed jurisdiction over the house as a whole. Whether or not the Commission may properly assert jurisdiction over any particular item used in home

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[23] The Third Circuit purportedly based its decision on the plain meaning of the statutory language, but it ignored the common sense reading of the requirement that a "consumer product" must be "used" by consumers. Aluminum wiring systems, which a homeowner never purchases apart from the house, and never touches, hears, or sees, are not "used" in any ordinary sense of the word. The Third Circuit's response—that a homeowner "uses" the electrical wiring system every time he turns on a light (App. A 6a)—is incorrect, for it takes the word "use" in isolation, and not in the context of the statutory definition and legislative intent as a whole. In fact, the Third Circuit's notion of "use" would apply equally to a house floor, which a homeowner "uses" when he walks, or to a roof, which he "uses" to keep out the rain; such "uses" do not make the house, or the floor, roof, or electrical wiring system thereof, "consumer products."

[24] *See* 42 Fed. Reg. 1428 (1977), *petitions for review pending*, Nos. 77-1216 and 77-1238 (D.C. Cir.) (architectural glass); Record of Commission Action (June 30, 1977), regarding "Whether certain prefabricated panels made of a combination of asbestos and cement used on residences and schools in Puerto Rico are consumer products" (wall board and roofs).

[25] Statement of Mr. Norman C. Barnett, CPSC Solicitor, during oral argument in *CPSC* v. *Anaconda Co.*, Nos. 78-1054 and 78-1070 (D.C. Cir.), on May 5, 1978, Official Transcript at 26.

construction, it is clear that the Commission and the Third Circuit have radically altered both the meaning of the statutory definition of "consumer product" and the scope of the Commission's regulatory powers.

This interpretation, if left uncorrected, will give the CPSC authority over virtually every purported safety issue affecting consumers, whether or not a "product" or an "article" is involved, and whether or not Congress contemplated federal regulation over the type of safety issues involved. Furthermore, this new gloss on the statutory language will replace state and local housing safety regulation with a federal scheme operated by an agency lacking both the skills and the enforcement capabilities required in this very complex area.[26]

The Consequences of the CPSC's Assumption of Authority Over Housing Safety

The Commission has suggested, both in the courts below and elsewhere, that its extremely broad reading of

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[26] The Commission's contention that its mandate extends to everything in the consumer environment—and not just consumer products—is akin to the arguments which have been made in attempts to broaden the range of the federal securities laws. In rejecting one such argument by the Securities and Exchange Commission, this Court recently held:

> "Even assuming . . . that a totally satisfactory remedy—at least from the Commission's viewpoint—is not available in every instance in which the Commission would like such a remedy, we would not be inclined to read [the statute] more broadly than its language and the statutory scheme reasonably permit. Indeed, the Commission's argument amounts to little more than the notion that [the statute] *ought* to be a panacea for every type of problem which may beset the marketplace."

SEC v. *Sloan*, —— U.S. ——, 98 S.Ct. 1702, 1711 (1978). Where a federal agency lays claim to "an awesome power with a potentially devastating impact" on those over whom the power is claimed, only a "clear mandate from Congress" will suffice to sustain the agency's claim. —— U.S. at ——, 98 S.Ct. at 1709.

the CPSA can be accommodated with the basic Congressional policy on housing matters by permitting the CPSC to regulate the design of building materials, but not the manner in which houses are built.[27] But such an artificial division of regulatory authority would make no sense.

First, state and local governments extensively regulate both the design of building materials and the use of those materials in the construction process; such regulation includes detailed controls over electrical wiring systems.[28] CPSC preemption of only one portion of this regulatory system would create chaos since, given the broad scope of the CPSA's preemption provision, *see supra* at 6 n.5, the validity of all types of state and local construction regulation would be placed in serious question.

Second, the Commission's attempt to distinguish between regulating the design of structural housing elements and regulating their construction is simply impracticable, for the quality of building materials and construction techniques are inextricably intertwined. To use an obvious example, a floor beam needs to be made of relatively strong materials if it is to be placed at wide separations from other floor beams, but if the beams were closer together, weaker materials would suffice. The same considerations apply to an electrical wiring system,

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[27] *See, e.g., Aqua Slide 'N' Dive Corp.* v. *CPSC*, 569 F.2d 831, 836 (5th Cir. 1978); CPSC Advisory Opinion No. 259, CCH Cons. Prod. Safety Guide ¶ 43,980 (1978); 41 Fed. Reg. 2742 (1976).

[28] Not only do state and local authorities regulate the licensing of electricians and the construction methods they may employ, *see, e.g.*, NATIONAL ELECTRICAL CODE ("NEC"), art. 300 (1978 ed.), but local electrical codes also prescribe specific safety-related features that electrical equipment must contain and require that electrical equipment must be "approved" by a recognized independent standard-setting body, such as Underwriters' Laboratories ("UL"). *See* NEC, arts. 110-2, 210-7, 336-2 and 410-56. In recent years, UL has in fact adopted special requirements for the wire and devices to be used in aluminum wiring systems. *See* NEC, arts. 110-14, 210-7(G) and 380-14(a)(4).

since the efficiency and safety of the system are dependent both upon the type of materials used and on the way in which electricians fabricate those materials into a system. Unlike the CPSC's proposed scheme, state and local regulation of housing construction can control the entire construction process by balancing the efficacy of different materials with the need for certain defined construction techniques.

Third, the Commission's suggested dichotomy would be meaningless in the context of a "recall" case brought by the agency pursuant to Sections 12 or 15 of the CPSA, 15 U.S.C. §§ 2061, 2064,[29] for in such a case the safety of an *already-integrated* part of the house would be at issue. Although, under the Commission's theory, a state standard would govern the way in which a given part was designed and constructed, the Commission would be free to step in after the fact and require a "recall" of the building materials. The CPSC's action might be based on its unhappiness with the state's design requirements for building materials, which the Commission purportedly could preempt prospectively, but which it might never have addressed in a formal standard. Alternatively, the action might be based on the agency's disagreement with state-mandated construction practices, which the Commission has conceded it cannot supplant. Obviously, such a retroactive federal intrusion into an

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[29] In a civil action under Section 12 or an administrative proceeding under Section 15, the CPSC can demand that manufacturers of allegedly defective consumer products refund the purchase price of the products to consumers, or repair or replace the products. As we discuss below at pages 19-20, the Commission has filed a Section 12 action in the United States District Court for the District of Columbia against 26 manufacturers of aluminum wire and electrical devices, alleging that certain aluminum wiring systems are "imminently hazardous consumer products," and demanding, *inter alia*, that the defendants pay for the "repair" of such systems, even though all of the allegedly defective systems were constructed before the Commission was established.

area so thoroughly covered by state and local law would be neither fair nor justified by any Congressional finding that the intrusion is necessary or otherwise likely to be in the public interest.

In short, given the nature of housing construction and safety problems, a unitary system is much preferable to a division of responsibility between federal, state and local authorities. Had the issue been raised, Congress could conceivably have concluded that federal authority should be imposed over the entire area and the traditional state and local authority preempted entirely. But not even the Commission contends that Congress has ever considered such a solution. Rather, the Commission and the Third Circuit have agreed that Congress has silently and unthinkingly ousted state and local authorities from their responsibility for regulating a significant portion of the housing safety area, has given that responsibility to the CPSC, an agency with no expertise in housing matters, and has left state and local authorities with some uncertain and undefined power over the installation of building materials, which the CPSC is free to second-guess in a "recall" case. The plain language and legislative history of the CPSA, as well as recent federal legislation in the housing safety area, demonstrate that Congress has done no such thing. The Third Circuit's decision thus raises an important issue of federalism that should be decided by this Court.

B. If This Court Is Not Disposed to Grant Certiorari at This Time, Action on the Petition Should Be Deferred Pending Review of the District of Columbia Circuit's Forthcoming Decision on the Same Issue.

If the Court is not inclined to grant immediate review in this case, Kaiser requests that the Court withhold action on this Petition, pending receipt of a petition concerning the forthcoming decision of the D.C. Circuit on

the identical issue of the CPSC's authority over aluminum branch circuit wiring systems.

On October 26, 1977, the Commission filed a Complaint in the United States District Court for the District of Columbia against 26 manufacturers of aluminum wire and wiring devices, alleging that "old technology" aluminum branch circuit wiring systems[30] are "imminently hazardous consumer products" within the meaning of Section 12 of the CPSA, and demanding, *inter alia*, that the defendants pay for the "repair" of such systems. *CPSC* v. *Anaconda Co.*, Civ. No. 77-1843. While all of the defendants strongly dispute the CPSC's factual allegations, most of the defendants, including Kaiser, immediately responded by filing motions to dismiss on two grounds: (a) that the Commission possessed no jurisdiction over aluminum wiring systems; and (b) that the Commission was collaterally estopped from maintaining the action by the District Court's decision in this case. On December 13, 1977, the district court in *Anaconda* granted Kaiser's motion to dismiss on collateral estoppel grounds, but denied the similar motions of the other defendants. 445 F. Supp. 498.[31]

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[30] The Commission's Complaint defines such systems as those constructed between 1965 and 1973.

[31] After the commencement of the instant action, but before the filing of the Complaint in *CPSC* v. *Anaconda Co.*, the Commission issued and served subpoenas upon nearly 50 manufacturers of aluminum branch circuit wire and wiring devices. When many of the companies declined to comply with the subpoenas on the ground, *inter alia*, that the CPSC lacked the requisite jurisdiction, the Commission brought an action to enforce the subpoenas in the United States District Court for the District of Columbia. In June 1977, that court concluded that the Commission had been given jurisdiction over aluminum wiring systems, but also determined that the intervening decision of the District Court here collaterally estopped the CPSC from asserting such jurisdiction against Kaiser. Accordingly, the petition for enforcement was granted as to the other companies, but denied as to Kaiser. *United States* v. *Anaconda Co.*, 445 F. Supp. 486. An appeal from that decision is still pending, No. 77-1628 (D.C. Cir.).

The Commission has appealed the order dismissing Kaiser, and Kaiser's co-defendants have appealed the order denying their motions to dismiss pursuant to 28 U.S.C. § 1292(b). Oral argument in those appeals, Nos. 78-1054 and 78-1070, was heard by the United States Court of Appeals for the District of Columbia Circuit on May 5, 1978.

Anaconda and the instant case thus present identical and substantial issues of federal regulatory policy. If this Court concludes that it ought not to grant certiorari in this matter immediately, then Kaiser asks the Court to hold this Petition until it receives a petition for a writ of certiorari concerning the D.C. Circuit's decision. Such a procedure would ensure that the trial judge in *Anaconda* can accord similar treatment to all defendants on the crucial jurisdictional issue. As the discussion of the *Anaconda* case indicates, the decision in the instant case may have collateral estoppel effects with respect to that litigation. If this Court were to deny Kaiser's Petition, and if the D.C. Circuit were later to rule that the Commission has no jurisdiction over aluminum wiring systems (and be upheld by this Court), the district court in *Anaconda* could conceivably conclude that, by virtue of collateral estoppel principles, Kaiser would be the only one of the 26 present defendants whose product can be regulated by the Commission. The evident unfairness of such a situation can easily be avoided by postponing action on this Petition until the Court has had an opportunity to review the forthcoming D.C. Circuit decision.

CONCLUSION

For the reasons stated above, Kaiser respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals declaring that the CPSC possesses jurisdiction over aluminum branch circuit wiring systems. In the alternative, Kaiser asks the

Court to postpone action on this Petition until such time as the identical issue is presented to this Court in *CPSC* v. *Anaconda Co.*

Respectfully submitted,

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June 23, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 77-1826

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX OF APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1874

KAISER ALUMINUM AND CHEMICAL CORPORATION

v.

THE UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; RICHARD O. SIMPSON, individually and in his capacity as a Commissioner of Consumer Product Safety Commission; BARBARA FRANKLIN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission; LAWRENCE KUSHNER, individually and in his capacity as a Commissioner of Consumer Product Safety Commission; CONSTANCE NEWMAN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission; R. DAVID PITTLE, individually and in his capacity as a Commissioner of Consumer Product Safety Commission

THE UNITED STATES,
Appellant

(D.C. Civil No. 76-44)

On Appeal from the United States District Court
for the District of Delaware

Argued January 5, 1978

Before GIBBONS, GARTH, *Circuit Judges*, and WEINER,*
District Judge

---

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

(Filed March 27, 1978)

GIBBONS, *Circuit Judge*

The Consumer Product Safety Commission (CPSC) appeals from a judgment of the district court which declares that the Consumer Product Safety Act, Pub. L No. 92-573, 15 U.S.C. § 2051 *et seq.*, grants CPSC no jurisdiction over aluminum branch circuit wiring or aluminum branch circuit wiring systems, and which enjoins CPSC from publishing regulations covering such products.[1] The plaintiff is Kaiser Aluminum and Chemical Corporation, a manufacturer of such products. We conclude that the court misconstrued the Act, and we reverse.

Branch circuit wiring conducts electric current from electrical panels containing fuses or circuit breakers to various terminals within a residence. These terminals include lighting fixtures, switches, and wall outlets in which the plugs of electrical appliances are inserted. Branch wiring is made of either copper or aluminum. Kaiser produces the aluminum variety and sells it to wholesalers, who in turn sell it to electrical contractors for installation in residences during construction. Once installed, it is as a rule completely enclosed in the walls of the structure.

Under the Act CPSC has regulatory authority over "consumer products." As defined in section 3(a)(1) of the Act, 15 U.S.C. § 2052(a)(1), that term means

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[1] The opinion of the district court is reported. 428 F. Supp. 177 (D. Del. 1977). Although the judgment disposed of only one count (Count III) of the complaint, the district court directed the entry of a final judgment pursuant to Fed. R. Civ. P. 54(b). Thus, the appeal is properly before us. While at one time CPSC challenged the jurisdiction of the district court, it has not renewed that challenge on appeal. We have nonetheless independently considered the district court's jurisdiction and agree that jurisdiction was properly exercised for the reasons stated by that court in an earlier opinion. 414 F. Supp. 1047, 1053-57 (D. Del. 1976).

any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—

> (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer . . . .

Pursuant to its regulatory authority under section 5(a) of the Act, 15 U.S.C. § 2054(a), CPSC collects, analyzes, and publishes information about hazardous products. Under sections 7(b) and 9(c)(2)(A) of the Act, 15 U.S.C. §§ 2056(b), 2058(c)(2)(A), it may also develop safety standards for consumer products and, where "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product[s]," may promulgate its standards by rule. Finally, under section 15 of the Act, 15 U.S.C. § 2064, it may, after a hearing, declare certain consumer products to present "substantial product hazards."

In November, 1973, following reports of electrical failures and overheating involving aluminum branch circuit wiring, CPSC opened an investigation into the product. Public hearings were held in March and April, 1974, to determine whether further investigation and eventual regulatory action were warranted. During 1975 CPSC published expressions of concern about potential fire hazards associated with the product. On August 7, 1975, CPSC voted to commence a proceeding to develop a consumer product safety standard, and on November 4, 1975, it published a notice to that effect. 40 Fed. Reg. 51,218 (1975). That notice disclosed CPSC's concern that aluminum branch circuit wiring exposed consumers to several serious hazards, including death or injury caused by burning or asphixiation.

In January, 1976, Kaiser commenced this action, seeking an injunction prohibiting CPSC's dissemination of information about aluminum branch circuit wiring and requiring the retraction of information previously published. In addition, Kaiser sought injunctive and declaratory relief against the further exercise by CPSC of jurisdiction with respect to the product, on the ground that it is not a consumer product. The district court accepted this contention, and this appeal followed. Kaiser relies on the plain language of the Act and on its legislative history.

A. The Plain Language of the Act

If the Act covers branch circuit wiring, it does so because that product is an "article, or component part thereof, produced or distributed . . . for the personal use . . . or enjoyment of a consumer in or around a . . . household or residence." Kaiser's first contention is that branch circuit wiring is not an "article." Rather, it contends, such wiring is a building supply material intended for incorporation in a residence and becoming a part thereof. It notes that by the dichotomy between articles and residences the Act clearly excludes buildings used as residences from the definition of consumer products. It does not follow from such exclusion, however, that the Act incorporates all the arcane knowledge about when personal property becomes a fixture and thus part of the building. If Kaiser's interpretation were correct, then many consumer products in common use—such as furnaces, water heaters, dishwashers, and lighting fixtures—would be excluded from coverage. We see nothing in the plain language of the Act suggesting that the word "article," a noun denoting any material thing, excludes

components incorporated in a residence if they otherwise fit within the definition.

Kaiser next contends that, even if branch circuit wiring is an article, it is not an article intended for the personal use or enjoyment of a consumer in a household or residence. Rather, Kaiser urges, it is an industrial building material intended for use by the electricians who install it in a building. It certainly is that, but once installed it is just as certainly used and enjoyed by householders whenever they turn on an electric switch. That it was first used in a different way by those who erected the building does not negate the plain fact that consumers later use and enjoy it. Kaiser correctly observes that the Act intended a distinction between consumer products such as teapots and razors on the one hand and industrial products on the other. But it would be impossible for a consumer to enjoy the use of an electric razor without also enjoying the use of the branch circuit wiring to which it is connected. Kaiser points out that such a consumer also enjoys the use of the power line in the street and the utility company's electric generator, and so he does. But those articles are not used "in or around" his household, while branch circuit wiring is.

Turning to another part of the consumer products definition, Kaiser notes that it excludes nine categories of products, including "any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer."[2] This exclusion, almost a mirror image of the general definition, is hardly a model of clarity but was undoubtedly intended to exclude industrial products, on the theory that industrial purchasers are better able to protect themselves

[2] Sec. 3(a)(1)(A). The other excluded categories are tobacco and tobacco products, motor vehicles, economic poisons, firearms, aircraft, boats, drugs and cosmetics, and food—all covered by other regulatory statutes.

and are subject to the separate regulatory scheme enacted by the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 29 U.S.C. § 651 *et seq.*

The House Report on the Consumer Product Safety Act explained the exclusion as follows:

> It is not intended that true 'industrial products' be included within the ambit of the Product Safety Commission's authority. Thus, your committee has specifically excluded products which are not *customarily* produced or distributed for sale to or use of consumers. The occasional use of industrial products by consumers would not be sufficient to bring the product under the Commission's jurisdiction. The term 'customarily' should not be interpreted as intending strict adherence to a quantum test, however. Your committee is aware that some products which were initially produced or sold solely for industrial application have often become broadly used by consumers. If the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers, the product may lose its claim for exclusion if a significant number of consumers are thereby exposed to hazards associated with the product.

H.R. Rep. No. 1153, 92d Cong., 2d Sess. 27 (1972) (emphasis in original). Kaiser established in the district court that although copper branch circuit wiring is customarily distributed through channels which make it readily available for purchase by householders, the aluminum product is significantly less available, since it is sold primarily to electrical wholesalers who sell directly to electrical contractors. The method of distribution chosen by a manufacturer for its product cannot, however, determine whether the product falls within the statutory definition. Either copper and aluminum branch circuit

wiring are both consumer products, or neither is. Since both are articles used or enjoyed by consumers in or around households, both are, according to the plain language of the Act, consumer products.

B. Legislative History

Kaiser discerns in the legislative history of the Act an intention to leave matters of specification, composition, and design of branch circuit wiring entirely to local building codes. It is doubtful whether we should even consider that argument in view of the explicit preemption in section 26(a) of the Act, 15 U.S.C. § 2075(a).[3] But Kaiser sees in the congressional decision to exclude housing design from the coverage of the Act an intention, despite section 26, to defer to local building codes on the design of housing components. Apart from section 26, there is, however, an express congressional finding in section 2(a)(4) of the Act, 15 U.S.C. § 2051(a)(4), that local control of consumer products which move in interstate commerce is "inadequate and may be burdensome to manufacturers." To place the manufacturers of building materials at the mercy of local code draftsmen would fly in the face of clear congressional intent. Local building codes continue to play a role in regulating "the installation and use of consumer products, such as electric, gas, or plumbing appliances." Bureau of National Affairs, The Consumer Product Safety Act: Text, Analysis, Legislative History 81 (1973). But design

[3] Sec. 26. (a) Whenever a consumer product safety standard under this Act is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer, unless such requirements are identical to the requirements of the Federal standard.

and performance standards for components are now a matter of national concern.

The only specific evidence to which Kaiser points is the defeat, during consideration of the bill in Congress, of an amendment offered by Senator Eagleton, which would have declared mobile homes to be consumer products. Kaiser infers from the defeat of this amendment a general intention to exclude all housing components. We are unpersuaded by the dubious logic of drawing a broad intention from the rejection of a narrow amendment. Furthermore, we find persuasive evidence to the contrary. After the defeat of the Eagleton amendment, the appropriate House committee reported:

> It is the committee's understanding that the definition of the term "consumer product" would include any component, equipment, or appliance sold with or used in or around a mobile home.

H.R. Rep. No. 1153, 92d Cong., 2d Sess. 28 (1972).

In addition, we cannot ignore the final Report (1970) of the National Commission on Product Safety, which was established by law in 1967. Pub. L. No. 90-146. That Report provided the basis for the later Act. In it, the Commission listed products the safety of which should be assured at the design stage. In Category XVII, "Home Structures [and] Construction Materials," it included such items as insulation materials, windows and window glass, and floors and flooring materials. In Category VI, "Home Furnishings and Fixtures," it listed electrical outlets, built-in wiring devices, and distribution systems for use in or around the household, as well as gas meters, electric meters, and attached electric light fixtures. That Congress was aware of this list is evidenced by references to it during floor debates by Congressman Moss, Chairman of the House Commerce Subcommittee on Commerce and Finance and sponsor of the

bill which became the Consumer Product Safety Act. Referring to the Commission's Report, he observed:

> Very serious questions were raised concerning the safety of many products not investigated by the Commission such . . . as *aluminum home wiring*. . . .

118 Cong. Rec. 31,378 (1972) (emphasis supplied).

Our review of the legislative history of the Act leads us to the same conclusion as that reached by the District Court for the District of Columbia, which was presented with the same question in *United States* v. *The Anaconda Company*, No. 77-0024 (June 15, 1977). Where the legislative history does not positively support CPSC's regulatory authority over branch circuit wiring, it is inconclusive at best. Our examination of the legislative history has, therefore, cast no doubt on our reading of the plain language of the statute.

The judgment appealed from will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1874

KAISER ALUMINUM AND CHEMICAL CORPORATION

vs.

THE UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; RICHARD O. SIMPSON, individually and in his capacity as a Commissioner of Consumer Product Safety Commission; BARBARA FRANKLIN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission; LAWRENCE KUSHNER, individually and in his capacity as a Commissioner of Consumer Product Safety Commission; CONSTANCE NEWMAN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission; R. DAVID PITTLE, individually and in his capacity as a Commissioner of Consumer Product Safety Commission

THE UNITED STATES,
Appellant

(D.C. Civil Action No. 76-44)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present: GIBBONS and GARTH, *Circuit Judges* and WEINER,* *District Judge.*

---

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting be designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on January 5, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 30, 1977, be, and the same is hereby reversed. Costs taxed against appellee.

Attest:

/s/ Thomas F. Quinn
Clerk

March 27, 1978

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 76-44

KAISER ALUMINUM AND CHEMICAL CORPORATION,
a corporation,

Plaintiff,

v.

THE UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; RICHARD O. SIMPSON, individually and in his capacity as a Commissioner of Consumer Product Safety Commission; BARBARA FRANKLIN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission; LAWRENCE KUSHNER, individually and in his capacity as a Commissioner of Consumer Product Safety Commission; CONSTANCE NEWMAN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission; R. DAVID PITTLE, individually and in his capacity as a Commissioner of Consumer Product Safety Commission,

Defendants.

Charles S. Crompton, Jr., Esquire, of Potter, Anderson & Corroon, Wilmington, Delaware; Arnold M. Lerman, Esquire, and Ronald J. Greene, Esquire, of Wilmer, Cutler & Pickering, Washington, D.C.; Max Thelen, Jr., Esquire, Fredric C. Nelson, Esquire, and Kennedy P. Richardson, Esquire, of Thelen, Marrin, Johnson and Bridges, San Francisco, California; Robert W. Turner, Esquire and Dennis M. Day, Esquire, of Kaiser Aluminum & Chemical Corp., Oakland, California, Attorneys for Plaintiff

John H. McDonald, Esquire, Interim United States Attorney, Wilmington, Delaware; Thomas S. Brett, Esquire, and Edward B. Craig, IV, Esquire, U.S. Department of Justice, Washington, D.C.; Michael A. Brown, Esquire and David Schmeltzer, Esquire, U.S. Consumer Product Safety Commission, Washington, D.C., Attorneys for Defendants

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OPINION

Wilmington, Delaware

March 11, 1977

STAPLETON, District Judge:

This is an action brought by Kaiser Aluminum and Chemical Corporation challenging on several grounds actions of the Consumer Product Safety Commission (hereinafter "CPSC" or "the Commission") with respect to aluminum branch circuit wiring. Kaiser sought both preliminary and permanent injunctive relief. The Commission moved to dismiss the complaint. In an earlier Opinion I denied both the motion to dismiss and the request for a preliminary injunction. Thereafter, the parties agreed to, and the Court approved, a stipulation severing for early trial the question of whether, by the actions complained of, the Commission exceeded its jurisdiction under the Consumer Product Safety Act, 15 U.S.C. § 2051, *et seq.* (hereinafter "CPSA" or "the Act"). The parties agreed to a trial of this question on affidavits and depositions. The written record is before the Court and the matter has been briefed and argued. It is now ripe for disposition.

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[1] These are fully described in the Court's first Opinion in this case. 414 F. Supp. 1047 (D. Del. 1976).

In my earlier Opinion I denied the preliminary injunction because I found that Kaiser had not shown the requisite likelihood of irreparable injury. However, I concluded on the basis of the record then before me that it was more likely than not that Kaiser would succeed on its argument that the Commission does not have the jurisdiction which it claims. The Commission has not presented any factual data or legal arguments that sway me from that initial determination.

I. The Statute.

The statute defines a consumer product as any article which is "produced or distributed"

> (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation or otherwise; or
>
> (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation or otherwise;[2]

The Act explicitly excludes from its coverage

> any article which is not *customarily* produced or distributed for sale to, or use by, or enjoyment of, a consumer.[3]

II. The Statutory Exclusion.

The purpose of this exclusion is to exempt from the Act those products which may occasionally be sold to a consumer but which are, in fact, industrial products—that is, products which are not produced or distributed with the intention that they will be sold to or used by

---

[2] 15 U.S.C.§ 2052(a)(1).

[3] 15 U.S.C. § 2052(a)(1)(A). (Emphasis supplied).

consumers in substantial quantities.[4] The exclusion does not cover all products the majority of the sales of which are to commercial or industrial users. All that is required to give the Commission jurisdiction, I conclude, is that an article which a consumer uses in or around a household be regularly available to consumers through channels to which they have reasonable access and that there be substantial incidence of consumer sales.

The evidence in this case shows that branch circuit wiring is available for sale to consumers through ordinary consumer channels. Before reviewing that evidence, I note that I have not considered aluminum branch circuit wiring as a product distinct from other branch circuit conductors. Kaiser has proffered no persuasive rationale for distinguishing aluminum from other branch circuit conductors. The hazards associated with each may differ but functionally the products are the same. Thus, if analysis were to show that, generically, branch circuit wiring is a consumer product, I would conclude that the CPSC could regulate aluminum branch circuit wiring for whatever hazards might be unique to it.[5]

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[4] H.R. Rep. No. 1153, 92nd Cong., 2nd Sess. 27 (1972) describes the purpose of the exemption:

> It is not intended that true "industrial products" be included within the ambit of the Product Safety Commission's authority. Thus, your committee has excluded products which are not customarily produced for sale to or use of consumers. The occasional use of industrial products by consumers would not be sufficient to bring the product under the Commission's jurisdiction. The term "customarily" should not be interpreted as intending strict adherence to a quantum test, however. Your committee is aware that some products which were initially sold solely for industrial application have often become broadly used by consumers. If the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers, the product may lose its claim for exclusion if a significant number of consumers are thereby exposed to hazards associated with the product.

[5] It does appear that aluminum wiring is less available to consumers than other conductors such as copper. For example, of the

The sales data submitted by the parties took a variety of forms. Results of a field survey, a mail survey, and a telephone survey have been filed, along with numerous affidavits from a wide array of individuals who have some tie to the distribution and regulation of branch circuit wiring. Much of the information is marginally useful because it deals solely with sales of aluminum wiring and no other conductor. Nevertheless, there is an ample record to show that a small but significant portion of branch circuit wiring is produced for sale to consumers.

Affidavits of officials of Sears, Roebuck and Company, the nation's largest retailer, and Wickes Lumber, the nation's largest retailer of building supplies, reveal that both companies stock branch circuit wiring for regular sale to consumers.[6] Commission investigators posing as consumer/do-it-yourself homeowners who wished to purchase electrical wiring visited "hundreds" of wholesale and retail outlets of various kinds, *e.g.*, hardware stores, electrical wholesalers, building supply houses. They were able to purchase wiring at 58 establishments in various locations throughout the country. Although many stores did not carry wiring, very few of those who did refused to sell to do-it-yourselfers.[7] Some did require that wire be purchased in lengths of 250 or 500 feet.[8]

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58 retail and wholesale establishments at which government investigators were able to purchase wiring, only 24 carried aluminum wiring. At least two explanations for this appear on the record. First, copper was the substance used traditionally for home wiring. Only when the price of copper rose did the industry begin to turn to aluminum as an alternative. Hazard Analysis—Aluminum Wiring at 1 (April 1975) (Doc. No. 17 Exh. I). Second, since questions about the safety of aluminum wiring have arisen, some merchants have ceased stocking it. *See* Wolff deposition at 30-31 (Doc. No. 80).

[6] Wolff deposition at 33 (Doc. No. 80); Smith affidavit (Doc. No. 77, Part D).

[7] Affidavits of Brockman, Hill, Knoche, Warchal (Doc. No. 82).

[8] Affidavits of Armbrust, Biggs, Brockman, Bruck, Burchyski, Goins, Hill, Labonski, Lime, Lindenmeier, Phillips, Simpson, Thompson, Vece (Doc. No. 82).

In his affidavit, George Ganzenmuller, editor of *Electrical Wholesaling*, reported the results of a survey his magazine conducted in 1975 among electrical wholesalers. It showed that, among those who responded, retailers or the general public accounted for 6.3% of their total sales.[9] The telephone survey conducted among wholesalers and retailers which Kaiser commissioned and which its authors say can be generalized to reflect the complete national sales picture shows that 35% of the retailers of hardware and building supply materials stock house wire.[10]

On this record, I feel confident in concluding that branch circuit wiring is produced and distributed in part for sale to consumers. If that were the complete test of what is a consumer product, I would yield to the Commission's judgment that it has jurisdiction over the product. But the statute requires more. The product not only must be produced or distributed for sale to consumers; it must also be for use by a consumer "in or around a . . . household".

III. Use "In or Around" a Household.

There can be no honest dispute that the product we are dealing with here is a building supply material intended for incorporation in a branch wiring system of a home. While the Commission's briefing makes much of a proposed distinction between regulating the design and composition of aluminum branch wiring and regulating its use in branch circuit wiring systems,[11] I conclude

[9] This figure covers *all* sales by the surveyed distributors, not just electrical wiring sales.

[10] Study by Elrick and Lavidge, Inc. (Doc. No. 77, Part B, Exh. A).

[11] The Commission professes to understand that the Act it administers gives it no authority to deal with problems associated with the installation of a product. *See* 15 U.S.C. § 2056(a)(1).

that this distinction lacks practical substance in the context of a product which is produced and distributed solely for installation in branch wiring systems. This wiring simply cannot be used by a consumer unless and until it is installed as part of the branch wiring system, and the CPSC has pointed to no hazards associated with aluminum wiring other than as a part of an installed branch wiring system. On the record before me, it would appear that there are none.

The actions of the Commission show that its interest is in aluminum branch wiring systems. The publications of which Kaiser here complains all refer to hazards which the Commission perceives to exist with respect to residential aluminum branch wiring systems. The scope of its concern is also evidenced by the notice commencing the development of a consumer product safety standard.[12] The CPSC there stated that the standard would be applicable to "household wiring systems involving . . . aluminum wire and various connections. . . ." Both the wire and "[a]ll products, devices and assemblies which are used for the purpose of connecting, terminating, bonding, splicing, joining or otherwise maintaining electrical continuity" were named in the list of products to be regulated under the standard that is being developed.[13] But wholly apart from the scope of the Commission's past activities in this area, this Court is mindful that it must give a practical and administratively feasible construction to the regulatory scheme established in the Act. I think it highly unlikely, to say the least, that Congress contemplated a construction of the Act which would require the CPSC to address any problem that may exist

[12] 40 Fed. Reg. 51218 (1975).

[13] This approach reflects the Commission's view that the hazard exists, not with insulated segments of aluminum branch wiring, but with segments at connecting and terminal points. *E.g.*, 40 Fed. Reg. 51219 (1975); CPSC Technical Fact Sheet Exh. L.

with aluminum branch wiring other than in the context of its use by consumers. The notice of the Commission's safety standard proceedings clearly suggests that it shares this view. Accordingly, the crucial question, I believe, is whether Congress intended that branch wiring systems would be within the scope of the responsibility of the CPSC or some other agency. In order to decipher this intent we must look to the statutory definition of a consumer product and to the legislative history.

As I observed in my original Opinion, it strains the language employed by Congress to say that something which is a part of a home is for use by a consumer "in or around" a home, and that is a necessary element of the statutory test of a consumer product. As I also pointed out at that earlier stage, the adoption of such a broad reaching construction of this "in and around" the home criterion would produce a result which is inconsistent with what I believe to be the contemplated regulatory scheme as reflected in the congressional deliberations.

An interpretation of the Act which would include electrical branch wiring among consumer products would also include a host of other building materials such as shingles, sheet rock and plumbing fixtures. These, too, are manufactured and distributed for installation in homes and may occasionally be obtained by a do-it-yourselfer for replacement purposes. However, such a broad construction of the statute would seriously undermine what I perceive to be the congressional intent with respect to the division of responsibility between federal and local regulatory bodies in this area.

The Commission does not deny that residential use of branch circuit wiring systems is a matter that has traditionally been regulated by local building and housing codes. I reviewed at length in my prior Opinion the legislative debates about whether the CPSA would embrace

hazards associated with residential construction.[14] These debates show that Congress decided it should not. Subsequently, Congress passed the Housing and Community Development Act of 1974 and therein created the National Institute of Building Sciences (hereinafter "NIBS" or "the Institute"). In sharp contrast to the broad preemptive powers of the Commission under the CPSA, the Institute was given a strictly advisory role.[15] NIBS is empowered only to make recommendations to state and local regulatory agencies with respect to "performance criteria, standards and other technical provisions for building regulations." [16] If the Commission's reading of its enabling legislation were correct, it would have the authority to preempt state and local building regulations, a result which seems diametrically opposed to the philosophy reflected in the creation of the NIBS.

The Commission nevertheless contends that the legislative history reveals an intent that the term "consumer product" be expansively construed to ensure that the public is protected against unreasonable risks of injury. It cites *Kordel* v. *United States*, 335 U.S. 345, 349 (1948), for the proposition that federal courts should avoid restrictive or technical constructions of public health and safety statutes which create "loopholes" at the expense of public protection. However, the Supreme Court has also cautioned that, in reviewing federal legislation that may preempt "an exercise of the 'historic police powers of the States,'" courts should not find that federal legislation has displaced state regulation "'unless that was the clear and manifest purpose of Congress, . . .'" [17]

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[14] 414 F. Supp., at 1059-61.

[15] *Compare* 15 U.S.C. § 2075 *with* 12 U.S.C. § 1701j-2(e)(1).

[16] 12 U.S.C. § 1701j-2(g)(4).

[17] *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146 (1963).

The question here is not whether there is a hazard from which the public should be protected or whether aluminum branch wiring systems should be regulated. Rather it is a question of how and by whom they should be regulated. Congress has affirmatively expressed its intention that this type of housing regulation remain in the class of police powers reserved to the States and that federal participation be limited to the informational and advisory roles exercised by the National Institute of Building Sciences. There is no room in this scheme for the Consumer Product Safety Commission.[18]

Submit order.

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[18] In fairness to the Commission it must be noted that the legislative history does provide some support for its view. During floor debates on the bill, Congressman Moss observed:

> Should any member think that the list of hazards compiled by the Commission [i.e., the National Commission on Product Safety] was a final and authoritative list I would recommend that he carefully read the hearings of the subcommittee on this legislation. Very serious questions were raised concerning the safety of many products not investigated by the Commission such as aluminum home wiring.

118 Cong. Rec. 31378 (September 20, 1972). Moreover, a review of the Final Report of the National Commission on Product Safety, which was a resource document before Congress during its consideration of the CPSA, shows that, in fact, it did list "[e]lectrical outlets, built-in wiring devices and distribution systems" among the products theretofore unregulated by other federal consumer legislation. *Id.*, at 90 (June 1970). For the reasons articulated in my prior Opinion, however, I conclude that the legislative history read as a whole is inconsistent with the Commission's position.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 76-44

KAISER ALUMINUM AND CHEMICAL CORPORATION,
a corporation,
Plaintiff,

v.

THE UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; RICHARD O. SIMPSON, individually and in his capacity as a Commissioner of Consumer Product Safety Commission; BARBARA FRANKLIN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission; LAWRENCE KUSHNER, individually and in his capacity as a Commissioner of Consumer Product Safety Commission; CONSTANCE NEWMAN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission; R. DAVID PITTLE, individually and in his capacity as a Commissioner of Consumer Product Safety Commission,
Defendants.

Charles S. Crompton, Jr., Esquire, of Potter, Anderson & Corroon, Wilmington, Delaware; Arnold M. Lerman, Esquire, and Ronald J. Greene, Esquire, of Wilmer, Cutler & Pickering, Washington, D.C.; Max Thelen, Jr., Esquire, Fredric C. Nelson, Esquire, and Kennedy P. Richardson, Esquire, of Thelen, Marrin, Johnson and Bridges, San Francisco, California; Robert W. Turner, Esquire and Dennis M. Day, Esquire, of Kaiser Aluminum & Chemical Corp., Oakland, California, Attorneys for Plaintiff

W. Laird Stabler, Jr., Esquire, United States Attorney, Wilmington, Delaware; Thomas S. Brett, Esquire, and Edward B. Craig, IV, Esquire, U.S. Department of Justice, Washington, D.C.; Michael A. Brown, Esquire and David Schmeltzer, Esquire, of the U. S. Consumer Product Safety Commission, Washington, D.C., Attorneys for Defendants

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OPINION

Wilmington, Delaware

May 27, 1976

STAPLETON, District Judge:

On October 27, 1972, the Consumer Products Safety Commission ("CPSC" or "the Commission") was launched pursuant to the Consumer Products Safety Act ("CPSA" or "the Act"). The CPSC was given regulatory authority over "consumer products" as defined in the Act.[1] That regulatory authority included the power to "collect, investigate, analyze, and disseminate injury data and information" regarding hazards associated with consumer products.[2] It also included the power to develop safety standards respecting the products under its jurisdiction,[3] and to promulgate these standards by rule where "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product.[4] In addition, the Commission's authority included the power, after conducting an adjudicatory-type hearing, to declare ap-

[1] 15 U.S.C. § 2052(a)(1).

[2] 15 U.S.C. § 2054(a).

[3] 15 U.S.C. § 2056(b).

[4] 15 U.S.C. § 2058(c)(2)(A).

propriate products to be "substantial product hazards" with certain potentially dire consequences to the products in question and their manufacturers and sellers.[5]

About a year after it came into existence, the Commission made an official determination that it had jurisdiction "to deal with those hazards to consumers which may result from the use of aluminum wiring in homes."[6] Soon after that decision the Commission contracted with the National Bureau of Standards for the assistance of its Technical Analysis Division ("TAD") in evaluating the safety of aluminum wiring.[7] Then, in the Spring of 1974, the Commission held public hearings in Washington, D.C., and Los Angeles, California, on the subject of "fire hazards associated with electrical wiring systems utilizing aluminum conductors".[8]

July of 1975 found the Commission deciding to make a public statement about what it had come to call the "aluminum wiring problem". In an issue of N.E.I.S.S. News,[9] an official publication of the Commission, it was stated that:

> Electrical failures in homes wired with aluminum have become a matter of concern for the U.S. Consumer Products Safety Commission. The Commission has received almost 500 reports of aluminum wiring incidents involving electrical malfunctions that have occurred in single-family dwellings be-

[5] 15 U.S.C. § 2064.

[6] Defendants' memorandum in opposition to plaintiff's motion, Doc. No. 17, Exh. B.

[7] Aff. of J. J. Cashel in support of plaintiff's motion, Doc. No. 6, at ¶ 3.

[8] Defendants' memorandum in opposition to plaintiff's motion, Doc. No. 17, Exh. E.

[9] National Electronics Injury Surveillance System, a Commission organ.

tween 1967 and 1975. Most of the reported aluminum wiring electrical failures resulted in damage to the electrical component or to the structure rather than resulting in injury.

. . . . .

Data on aluminum wiring hazards were gathered primarily through CPSC area offices by investigators who followed up on leads from outside sources. The major sources of electrical failure reports involving aluminum wiring have come from individual consumers, home owner and tenant associations, fire marshals and electrical inspectors, and the National Fire Protection Association. Many complaints involving aluminum wiring were received by the Commission's hot line from the New York area after an article on aluminum wiring appeared in a local newspaper.

> The reports received by the Commission recorded damage ranging from the failure of an electrical component to fires resulting in 12 deaths and over a quarter of a million dollars in property damage. . . .[10]

It next developed that, on August 7, 1975, the Commission voted unanimously to commence safety standard development proceeding respecting "aluminum wire in sizes AWG No. 10 and smaller and devices intended for use with it in branch circuits. . . ." [11] and, by a split vote, to prepare for the commencement of a "substantial product hazard" proceeding respecting " 'old technology' aluminum wire [12] in sizes AWG No. 10 and smaller and wiring devices intended for use with, or that could rea-

[10] Defendants' memorandum in opposition to plaintiff's motion, Doc. No. 17, Exh. K.

[11] Branch circuits are those circuits of household wiring running from the fuse box to individual components and/or convenience outlets.

[12] "Old technology" wire is wire manufactured before 1971.

sonably have been expected to be used with, 'old technology' wire in new installations." [13] These actions were followed in September, 1975, by the publication of a document called a "Technical Fact Sheet", which stated, in part:

> There is a potential fire hazard with aluminum which can develop in the following steps:
>
> —an oxide film which does not conduct electricity forms naturally on aluminum.
>
> —unless electrical connectors adequately maintain current flow through breaks in the oxide film, electrical resistance can build up and cause sustained overheating.
>
> —the overheating can lead to rapid destruction of insulating material which can cause a fire.
>
> The U.S. Consumer Product Safety Commission has collected data on approximately 500 incidents involving aluminum wiring that occurred in single family dwellings, mobile homes, and multi-family dwellings between 1967 and 1975. The data includes some reports of fires with extensive structural damage to the home. Twelve deaths were reported. The Commission has conducted research and testing through the National Bureau of Standards concerning the aluminum wire problem. . . .[14]

On November 4, 1975, the Commission issued the required public notice of the authorized safety standard development proceeding, in which notice the following statements were made:

[13] *Id.*, Exh. J.

[14] *Id.*, Exh. L.

Prior to August 1974, the Commission had received 165 reports of electrical failures involving aluminum wire. . . .

On August 29, 1974, an article discussing the hazards of aluminum wire was published in NEWSDAY, a Long Island, N.Y., newspaper. The article suggested that consumers report electrical problems to the Consumer Product Safety Commission's "hotline." Between August 29 and September 17, the Commission received 404 phone calls from the New York area relating to aluminum wire. 179 calls were from homeowners who had observed danger signals or had electrical malfunctions involving aluminum wire. . . .

Hazardous conditions such as burned wire insulation, burned receptacles, fires in receptacles or wall switches, odor of burning wires and smoldering in walls, and electric arcing of switches and receptacles were reported by 96 homeowners. Another 30 homeowners reported symptoms of hazardous conditions such as oversized receptacles and switches, scorched walls, and melted receptacles and wire insulation. 53 callers reported flickering lights or inoperative switches and outlets. The Commission's staff made follow-up investigations of HOTLINE calls from Medford, N.Y., and confirmed the validity of several reported incidents.

* * * *

The National Bureau of Standards (NBS) has performed laboratory studies for the Commission to determine what potential mechanisms of failure exist with aluminum wire and various connections. NBS reported that electrical failures and overheating can be reproduced with certain types of connections to aluminum wire.

The Commssion, on the basis of the public hearing record, hazard analysis reports, hotline data and the NBS and other studies preliminarily determines that aluminum wire systems as defined in section C(1) of this notice present an unreasonable risk of injury.[15]

In conjunction with this notice of proceeding, the CPSC issued a written press release, stating in part:

The Commission has preliminarily determined that hazards associated with aluminum wire systems present an unreasonable risk of injury or death on the basis of testimony received at two public hearings held in Washington, D.C., and in Los Angeles in March and April 1974, research at the National Bureau of Standards, and hundreds of hotline calls and letters received from consumers detailing problems with aluminum wire systems. The Commission has collected reports of over 165 aluminum wiring failures and numerous aluminum wiring related fires.

Between August 29 and September 17, 1974, the Commission's hotline received 404 phone calls from the New York area in response to a newspaper article discussing the hazards of aluminum wire. Of those calls, 179 homeowners reported hazardous conditions such as burned wire insulation, burned rereptacles, fires in wall switches, the odor of burning wires, overheated switches, scorched walls, and melted wire insulation.[16]

Sections 6(b)(1) and (2) of the CPSA, 15 U.S.C. § 2055(b)(1), (b)(2) provide, in part, as follows:

(b)(1) Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under

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[15] *Id.*, Exh. M.

[16] *Id.*, Exh. N.

this chapter, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter. If the Commission finds that, in the administration of this chapter, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such in accurate or misleading information.

(2) Paragraph (1) (except for the last sentence thereof) shall not apply to the public disclosure of . . . information in the course of or concerning any administrative or judicial proceeding under this chapter.

Relying on Section 6(b)(1), Kaiser Aluminum and Chemical Corporation ("Kaiser"), one of the principal

manufacturers of aluminum branch circuit wiring, wrote the Commission on December 17, 1975, seeking a retraction of various aspects of the above-quoted statements of the Commission respecting this product and requesting, with respect to any future public statements, prepublication notice and opportunity for comment.[17] When Kaiser received no response from the Commission, this lawsuit ensued.

Kaiser argues that the Commission's publications of the N.E.I.S.S. news article, the Technical Fact Sheet, the Federal Register notice-of-proceeding, and the press release accompanying that notice [hereafter "the Commission releases"] were unlawful in that:

1. The notification and opportunity-to-comment procedures of Section 6(b)(1) were not followed.

2. The Commission failed, in further violation of Section 6, to take reasonable steps to assure the accuracy of the information disclosed in the releases.

3. The Commission further failed, in violation of Section 6(b)(1), to take reasonable steps to assure that the disclosures made in its releases were "fair in the circumstances" and "reasonably related to effectuating the purposes [of the Act]".

Kaiser seeks a preliminary and permanent injunction against any further instances of this alleged unlawful activity, along with a permanent injunction directing the CPSC to retract certain of the statements made in the releases.[18] In addition, Kaiser seeks a preliminary and permanent order restraining the CPSC from making *any* statements concerning aluminum branch circuit wiring or wiring systems (whether in conformity with Section

[17] Complaint, Doc. No. 1, Exh. A-1.

[18] Kaiser concedes that it is not entitled to *pendente lite* relief by way of retraction.

6(b)(1) or not), on the ground that aluminum branch circuit wire and wiring systems are not "consumer products" within the meaning of Section 3(a)(1) of the Act. For this reason, Kaiser maintains that any actions taken by the Commission with respect to such wiring are beyond the scope of its jurisdiction.

The Commission has moved to dismiss Kaiser's complaint, arguing that this Court does not, at least presently, have jurisdiction to hear Kaiser's claims and that, in any event, the provisions of Section 6(b)(1) are inapplicable to the Commission releases in question. In response to Kaiser's claims, the Commission also argues that it *does* have jurisdiction over aluminum branch circuit wiring and wiring systems and that its actions to-date with respect to that product have been entirely lawful.

Presently before the Court are Kaiser's application for a preliminary restraining order and the Commission's motion to dismiss. On the record before me, I find I must deny both motions.

I. The Commission's Motion to Dismiss.

A. Jurisdiction

The Court has no doubt that it has jurisdiction to entertain Kaiser's claims. In *GTE Sylvania, Inc.* v. *Consumer Product Safety Commission*, 404 F. Supp. 352 (D. Del. 1975), the Commission had given notice of its intent to honor a Freedom of Information Act request for release of certain manufacturer-supplied data relating to television accidents. Various television manufacturers sued in this Court to enjoin release of the data on the grounds that the Commission had not taken sufficient steps to insure accuracy, fairness and purposefulness as required by Section 6(b)(1) of the Act. The Court reached the merits of that case, ruling it had jurisdiction to do so pursuant to 28 U.S.C. § 1337 which provides:

> The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . .

Given the similarities of the issues involved in this case and in *GTE*, the *GTE* ruling would appear to constitute a controlling precedent for the jurisdictional questions in this case.[19] See also *A.O. Smith Corp.* v. *FTC*, 530 F.2d 515, 519 (3d Cir. 1976).

The Commission "concedes that had no further proceedings been planned by the CPSC regarding aluminum wire after the release of . . . [the] first two disclosures, . . . [the] court could review the agency action pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706."[20] In the Commission's view, however, the fact that a safety standard development proceeding pursuant to Section 7 of the Act[21] is pending before it deprives this Court of jurisdiction. The Commission's argument apparently is that the standard development proceeding affects the propriety of this Court's involvement in three interrelated ways:

> 1. The pendency of the proceeding precludes there having been any "final agency action", on which to predicate judicial review.
>
> 2. The rule-making proceeding provides Kaiser with an administrative remedy which it must exhaust prior to seeking relief in this Court.
>
> 3. Under the scheme of the Act, once a rule-making proceeding has commenced, judicial review

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[19] Another basis for jurisdiction would be 28 U.S.C. § 1331. Kaiser's claims certainly involve interpretation of a federal statute, and Kaiser claims to have lost hundreds of thousands of dollars as a result of the Commission's alleged wrongdoing.

[20] Defendants' brief in support of its Motion to Dismiss p. 12.

[21] 15 U.S.C. § 2056.

of all Commission actions with respect to the product involved is vested exclusively in the relevant court of appeals, pursuant to 15 U.S.C. § 2060(a).[22]

1. *Final Agency Action.*

As earlier noted, the Commission has several functions. One of these involves the collection and public dissemination of data regarding consumer product hazards. Another function involves the formulation of safety standards and their promulgation in rule-making proceedings. Kaiser here seeks to restrain the exercise of the information function respecting aluminum branch wiring on the grounds that the Commission lacks jurisdiction over this product and that, in any event, it is exercising this function in violation of Kaiser's rights under Section 6(b)(1) of the Act. While a determination of these claims might have some precedential value in the context of the Commission's Section 7 proceeding, Kaiser is not attempting in this action to abort that proceeding.[23]

In this context, and with the Commission's concession that Kaiser could have secured judicial review of the Commission's exercise of its information dissemination function in the absence of the Section 7 proceeding, it is

[22] A short answer to these arguments would be that there was also a Section 7 proceeding pending at the time of the *GTE* case. 40 Fed. Reg. 8592. These arguments were apparently not addressed to the Court in that case, however, and accordingly, I do not consider *GTE* to be controlling on this point.

[23] Kaiser seeks no injunctive relief against the Section 7 proceeding. It does, however, maintain that the Notice of this proceeding violated Section 6(b)(1) and one interpretation of the relief that it does seek would entail a restraint on similar Commission publications in connection with the Section 7 proceeding. I conclude, however, that Section 6(b)(1), with the exception of the last sentence dealing with retractions of previously published information found to be false, does not apply to the publication of material for the purposes of an administrative proceeding like the one currently pending under Section 7. Section 6(b)(2), 15 U.S.C. § 2055(b)(2).

difficult to understand the Commission's argument that there is no final agency action currently available to be reviewed. The facts are (1) the Commission has allegedly disseminated information to the public in violation of Kaiser's rights and allegedly will continue to do so, in the future, and (2) Kaiser alleges serious, immediate and continuing injury to its business from this dissemination. In these circumstances, there has been final agency action.[24]

2. *Exhaustion of Remedies.*

The Commission concedes that there is no specially established Commission procedure for reviewing claims that a manufacturer's rights under Section 6(b)(1) have been violated.[25] It argues, however, that the pending

[24] See, for example, *Utah Fuel Co.* v. *Coal Commission*, 306 U.S. 56 (1939) (district court's equity jurisdiction extended to bill for injunction to prevent Commission's release of allegedly confidential information, even though administrative hearing in which the information was proposed to be used was pending); *Silver King Mines* v. *Cohen*, 261 F. Supp. 666 (D. Utah 1966) (district court suit to enjoin SEC's unwarranted releases of damaging information was proper despite pendency of SEC proceedings to which releases pertained); *cf. Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149-152 (1967) ("finality" requirement to be pragmatically interpreted); *Lam Man Chi* v. *Bouchard*, 314 F.2d 664, 670 (3rd Cir. 1963) (whether agency action is "final" depends upon "realistic appraisal of the consequences of such action"); *Columbia Broadcasting Systems* v. *United States*, 316 U.S. 407, 418-19 (1942) (FCC regulation which amounted to only a "statement of intentions" held reviewable where it caused "injury cognizable by a court of equity"); *Aquavella* v. *Richardson*, 437 F.2d 397 (2nd Cir. 1971) (a withholding of needed funds pending administrative audit held final agency action); *Isbrandtsen Company* v. *United States*, 93 U.S. App. D.C. 293, 211 F.2d 51 (1954), *cert. denied*, 347 U.S. 990 (1954) (temporary order of federal maritime board having serious economic consequences to steamship line held immediately reviewable).

[25] Transcript of Oral Argument on Cross-Motions (March 5, 1976) ["T"], at 51. It also concedes, as it must, that Kaiser's letter application did not result in a Commission determination of Kaiser's claims.

proceedings provide Kaiser with a remedy it can, and must, exhaust, prior to coming to the courts. Section 9(c) of the Act,[26] the Commission notes, provides that: (1) prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to—

> (A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce;
>
> (B) the approximate number of consumer products, or types or classes thereof, subject to such rule. . . .

The Commission asserts that Kaiser will be able to raise its claims about the Commission's jurisdiction in the course of arguing the Section 9(c)(1)(B) issue and its claims about the fairness and accuracy of the Commission's releases in the course of arguing the Section 9(c)(1)(A) issue. Given the availability of this remedy, the Commission argues, the Court should stay its hand and give the CPSC "an opportunity to make a record, apply [its] expertise, and [if necessary] . . . correct [its] own errors. . . ." [27]

Before the exhaustion of any administrative remedy will be required, however, that remedy must be shown to be "adequate". An adequate remedy, the Supreme Court has stated, is one which promptly and certainly affords the litigant an opportunity to obtain the relief sought.[28] In the present case the proffered remedy does not measure up to the applicable standard.

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[26] 15 U.S.C. § 2058(c).

[27] Defendants' Reply Memorandum, Doc. No. 32, at 3, *citing Parisi* v. *Davidson*, 405 U.S. 34, 37 (1971).

[28] *Parisi* v. *Davidson, supra*, 405 U.S. 41-2.

With regard to promptness, the statutory scheme under which the Commission operates requires, with exceptions not here relevant,[29] that the development of a consumer product safety standard shall precede the publication and promulgation of a consumer product safety *rule* with respect to the consumer product in question.[30] Kaiser has asserted without contradiction that the Commission's own experts have estimated that the development of a safety standard with respect to aluminum wiring and/or wiring systems will likely take until sometime in mid-1978.[31] Given Kaiser's allegations that the Commission's public releases have caused and will continue to cause severe damage to its aluminum wire business (including its sales, good will and certain of its business relationships), a wait of this duration seems unduly harsh. *Cf. Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587, 591 (1926) (two-year delay by administrative agency in acting on plaintiff's proposed rate schedule precluded agency's reliance on exhaustion of remedies doctrine where plaintiff claimed rates were confiscatory); *Sunshine Publishing Co.* v. *Summerfield*, 184 F. Supp. 767, 769 (D.D.C. 1960) (15 month delay in acting on plaintiff's mailing permit precluded post office from relying on exhaustion of remedies doctrine).

With regard to certainty, the Supreme Court has made it clear that an administrative remedy which bars early resort to judicial remedies must be something more than speculation.[32] Here, there is no reason to expect that the Commission will or should concern itself in the rule-making proceeding with the issues of whether Kaiser is

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[29] 15 U.S.C. § 2057.

[30] 15 U.S.C. § 2058(a)(1).

[31] Plaintiff's Reply Memorandum, Doc. No. 19, at 29 n. 18.

[32] *Parisi* v. *Davidson, supra; cf. Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 625 (1946).

entitled to pre-publication notice of releases like those of July and September, 1975 and whether the Commission has taken or will take, reasonable steps prior to such releases to assure that the information is "accurate" and "fair in the circumstances". Nor is there any assurance that, in the rule-making proceeding, the Commission will address itself to the issue of whether there should be a retraction of the specific information supplied in the Commission's public releases.[33]

It is true that at some point in the rule-making proceeding, the Commission is likely to address itself to whether it has jurisdiction to promulgate a rule regarding aluminum branch wiring and I know of no reason why that legal issue would be different when posed in that context than when posed in the context of the Commission's authority to disseminate information about consumer product hazards. I am persuaded, however, that the rule-making proceeding does not bar this Court from entertaining Kaiser's claim concerning the Commission's jurisdiction.

The exhaustion of remedies doctrine is not a jurisdictional matter,[34] but "is applied in a number of different situations, and is, like most judicial doctrines, subject to numerous exceptions, [its application to specific cases requiring] an understanding of its purposes and of the particular administrative scheme involved." [35] A leading author in the administrative law field has, in fact, suggested that, where the attack on administrative action

[33] There is even no assurance that there ever will be a rule-making proceeding since Section 7(f) of the CPSA gives the Commission the power to discontinue proceedings at the safety standard development stage. 15 U.S.C. § 2056(f).

[34] *Ecology Center, Inc.* v. *Coleman*, 515 F.2d 860, 865-66 (5th Cir. 1975).

[35] *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (footnote omitted).

is based on an asserted lack of jurisdiction, three factors are to be weighed in determining whether the exhaustion requirement is to be imposed: extent of injury from pursuit of the administrative remedy, degree of clarity or doubt about the administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction.[36]

I agree with the Commission that the question of its jurisdiction over aluminum branch wiring is one about which reasonable minds could differ. On the other hand, I am not convinced that the CPSC possesses any special expertise in construing the "consumer product" language of its enabling statute, as distinguished from its expertise in evaluating the safety of, or the degree of risk associated with, the various consumer products themselves. Furthermore, the question is one of law to be determined, not on the basis of a fact record to be developed by the Commission, but on the basis of the statute and its legislative history. Lastly, Kaiser, as already noted, has alleged that its aluminum wiring business is being and, during the course of the Commission proceedings, will be substantially and unfairly undermined by the Commission's releases. Under these circumstances, exhaustion of whatever opportunities there may turn out to be in the rule-making proceeding should not be required.

3. *Preclusion Of Review.*

Finally, the Commission argues that the Congressional designation of courts of appeals [37] as the appropriate judicial bodies to review Commission-promulgated rules

[36] 3 *Davis, Administrative Law Treatise* 69 (1958).

[37] 15 U.S.C. § 2060 provides that review of CPSC rules may be had in the "United States Court of Appeals for the District of Columbia or for the circuit in which [an aggrieved], [a consumer] or [consumer organization], resides or has his principal place of business. . . ."

forecloses review in this Court, at least at this time.[38] It relies, in particular, on *Getty Oil (Eastern Operations), Inc.* v. *Ruckelshaus*, 467 F.2d 47 (3rd Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). I find this argument unpersuasive.

In *A. O. Smith Corporation* v. *F.T.C.*, 530 F.2d 515 (1976), the Third Circuit had occasion to comment on the scope of *Getty Oil*. That case applied, said the Third Circuit, to situations where "[the relevant statute] demonstrated *a clear Congressional* intent to limit judicial review . . . to the Court of Appeals".[39] In the present case, no such Congressional intent appears.

15 U.S.C. § 2060, the part of the CPSA dealing with review by the courts of appeals, states in relevant part:

> (a) No later than sixty days after a consumer product safety rule is promulgated by the Commission, any person adversely affected by *such rule*, or any consumer or consumer organization, may file a petition . . . for a judicial review *of such rule*. . . . The Commission shall transmit to the Attorney General, who shall file in the court, the record of the proceedings on which the Commission based its rule. . . . For purposes of this section the term "record" means *such consumer product safety rule* . . . any written submission of interested parties; and any other information which the Commission considers relevant *to such rule*.
>
> * * * *
>
> (c) Upon the filing of the petition . . . the court shall have jurisdiction to review *the consumer product safety rule* . . . and to grant appropriate relief. . . . The *consumer product safety rule* shall not be affirmed unless the Commission's findings . . . are supported by substantial evidence on the record taken as a whole.
>
> (d) The judgment of the court affirming or setting aside, in whole or in part, *any consumer product safety rule* shall be final. . . .

[38] Defendants do concede that, if the pending rule-making proceeding were to abort, review could be had in this Court. Memorandum in Support of Motion to Dismiss, Doc. No. 16, at 23.

[39] *Id.*, at 14-15 (emphasis supplied).

The most natural reading of this statute would be one limiting the scope of review to the Commission's promulgation of a rule. Such a reading would not, of course, cover Kaiser's claims about unfair publicity. In any event, there is no evidence in the statute that the court of appeals' review was meant to be exclusive. In fact, the concluding paragraph of the section states: "the remedies provided for in this section shall be in addition to but not in lieu of any other remedies provided by law." Accordingly, defendants' third argument is without merit and the Court has jurisdiction to hear this case.[40]

B. *Failure To State A Claim.*

As a second ground for its motion to dismiss, the Commission argues that Kaiser is not entitled to relief under Section 6(b)(1) (15 U.S.C. § 2055(b)(1)) because its identity is not "readily ascertainable" from the Commission's releases. Conceding that a manufacturer need not be expressly named in a public release of information to be entitled to the protections of Section

[40] Defendants' ancillary reliance on *Weinberger* v. *Hynson, Wescott & Dunning*, 412 U.S. 609, 627 (1972) and *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 649, 652 (1972) is misplaced. These cases merely hold that, under the scheme of the amended Food, Drug and Cosmetic Act, the FDA has the authority to make certain determinations regarding its jurisdiction without the need for a court proceeding. In the present case, the Commission's authority to make an initial determination regarding its jurisdiction and to proceed accordingly has not been questioned.

6(b)(1), the Commission nevertheless argues that where, as here, the publications are directed at a whole "category of products" and do not single out any particular manufacturer of the product, Section 6(b)(1) does not apply. Kaiser responds, however, that since it is one of the only four manufacturers of aluminum branch wiring and since contractors who purchase these products associate the Kaiser name with it, Kaiser's identity is "readily ascertainable" from the releases.

Section 6(b)(1), quoted earlier, evidences a Congressional realization that the Commission's informational activities might cause substantial injury to manufacturers of consumer products. The section thus mandates that if the Commission finds it has publicly disclosed inaccurate or misleading information which reflects adversely upon the safety of a consumer product or the practices of any manufacturer, a retraction shall be made. This is a blanket provision applicable to all public disclosures by the Commission in any context, and without regard to whether the public information identifies a particular manufacturer.

The other provisions of Section 6(b)(1) are more circumscribed than the retraction provision, however. The prior notice provision, for example, requires the Commission to notify "each manufacturer . . . of any consumer product to which such information pertains" but *only* "if the manner in which such consumer product is to be designated or described . . . will permit the public to ascertain readily the identity of such manufacturer." Similarly, the mandate of the Act concerning "reasonable steps [to assure accuracy and fairness] . . . prior to public disclosure" refers expressly only to "information from which the identity of such manufacturer or private labeler may be readily ascertained."

The possibility of injury to manufacturers from information pertaining solely to a generic product, without direct or indirect reference to any particular manufacturer or manufacturers of the product, was apparent to Congress. The retraction provision which it adopted was designed to cover this situation. Congress also apparently realized that there would be practical limits on the Commission's ability to give advance notice, and an opportunity to comment, to all manufacturers who might conceivably be injured by a Commission publication. In striking the balance, it seems to this Court that Congress restricted the Commission's pre-notification obligations to situations where a manufacturer is expressly identified or where the release identifies a distinctive feature of a product not common to other manufacturers in the same product line and thereby indirectly informs the public of the identity of a particular manufacturer or manufacturers.[41]

Given this construction, it follows that Kaiser is not entitled to pre-publication notice of releases such as those currently under attack here. It does not follow, however, that the Commission's motion to dismiss should be granted.

First, the Commission's success with respect to the "readily ascertainable" standard does not provide an answer to Kaiser's argument regarding lack of Commission jurisdiction. Nor does it provide a satisfactory response to Kaiser's claim of entitlement to a retraction. It is true that the duty of retraction provision refers

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[41] The protection extended thus appears to be protection from unfair disclosure which injures a particular manufacturer in his ability to compete with other manufacturers of the same consumer product. Kaiser has made an appealing argument that this rationale should entitle it to pre-publication notice because the product here is aluminum branch circuit wiring in general and its capacity to compete with copper branch circuit wiring is being jeopardized. I conclude, however, that application of this rationale to the notification provisions of Section 6(b)(1) would prescribe an administratively infeasible standard.

to situations where "the Commission finds" it has erred and, if the Commission had an established procedure by which affected manufacturers had the opportunity to try to persuade the Commission that a particular release was inaccurate, I would be reluctant to hold that there could be a judicial review of such a change without prior resort to that remedy. Absent any such administrative procedure, however, the protection which Congress intended the manufacturers and the public to have would be seriously jeopardized if retraction had to await the fortuitous occasion when the Commission happened to come back to the subject matter of its erroneous release and see the light.

Finally, while the language of the "reasonable steps" provision is limited to information identifying a particular manufacturer, the Commission concedes, as I understand it, that it is subject to the overriding requirement of the Administrative Procedure Act ("APA") that it avoid agency action which is "arbitrary, capricious [or] an abuse of discretion."[42] Given the allegations of Kaiser's complaint, I am unwilling to find that it cannot possibly establish a claim of this kind. *Conley* v. *Gibson*, 355 U.S. 41, 45-6 (1957).

The Commission's motion to dismiss will, accordingly, be denied.

II. KAISER'S MOTION FOR A PRELIMINARY INJUNCTION.

In the *GTE* case, this Court summaried the considerations to be weighed in deciding whether *pendente lite* injunctive relief is appropriate:

> Before preliminary injunctive relief may be granted, plaintiffs must show (1) a reasonable probability of eventual success on the merits and (2) that they will suffer irreparable harm *pendente lite* if relief is not granted, and, furthermore, the Court must consider (3) the impact of its decision on other interested persons and (4) the public interest. *Oburn* v. *Shapp*, 521 F.2d 142, 147 (C.A. 3, 1975); *Delaware River Port Authority* v. *Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (C.A. 3, 1974); *A.O. Smith Corp.* v. *FTC*, 396 F. Supp. 1108, 1117-20 (D. Del. 1975) (appeal pending); *Bowers* v. *Columbia General Corp.*, 336 F. Supp. 609, 613 (D. Del. 1971).

404 F. Supp. at 369.

[42] 5 U.S.C. § 706(2)(A); *GTE Sylvania, Inc.* v. *Consumer Product Safety Commission*, 404 F. Supp. 352, 367 (D. Del. 1975).

A. *The Probability of Kaiser's Ultimate Success On The Merits.*

1. *Kaiser's Jurisdictional Attack.*

The CPSA defines "consumer product" as follows:

> [A]ny article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise. . . .[43]

Since aluminum wire intended for use in branch circuits is not sold directly to consumers as such, the parties agree that any jurisdiction of the Commission over this product would necessarily involve a conclusion that it is an "article . . . produced or distributed . . . for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence.

[43] 15 U.S.C. § 2052(a)(1). The definition of "consumer product" recites nine exceptions, none of which is here relevant.

. . ." Kaiser maintains that aluminum branch wiring is a part of the house itself and thus cannot be something used "in or around" a house.

While the Commission "does not contend that it has authority to regulate housing,"[44] it does assert that aluminum branch wiring is a consumer product over which it has jurisdiction. It does not torture the statutory definition, the Commission suggests, to think of a consumer "using" the wiring "in his house" (as, for example, when he turns on some electrically-powered device).

Although on a purely linguistic basis, I find Kaiser's interpretation more persuasive, I believe the statutory language sufficiently ambiguous to justify resort to extrinsic interpretative aids. *Cf., e.g., United Shoe Workers* v. *Bendell*, 165 U.S. App. D.C. 113, 118, 506 F.2d 174, 179 (1974). The available extrinsic evidence provides substantial support for Kaiser's assertions that the Commission has not been granted jurisdiction over aluminum branch circuit wiring.

From the outset, both the House and Senate versions of the CPSA contemplated that Commission-approved standards for "consumer products" would preempt the field. With one exception, a state or local government could have a generally applicable standard relating to the same consumer product hazard only if it were "identical" to the federal standard.[45] In the finally adopted House version, the one exception involves situations where the Commission, by rule, issued after notice and hearing, exempts a specific proposed local standard from the preemption provisions of the Act—this after finding that the local standard (1) imposes a higher level of performance than the federal standard, (2) is required by

[44] T. 44.

[45] For the final version of the preemption section, see 15 U.S.C. § 2075.

compelling local conditions, and (3) will not unduly burden interstate commerce.[46]

At the same time, Congress, in considering the CPSA, seems to have contemplated that the Act would not, at least as a general proposition, preempt state and local building codes. The primary concern of Congress, in fact, appears to have been the filling of *gaps* in existing national/state regulation, rather than the supplanting of local regulation of housing design and construction. This fact is highlighted in the debate concerning the treatment to be accorded mobile homes under the CPSA. Senator Eagleton, for example, proposed an amendment to the Act which would have expanded the definition of a "consumer product" to expressly include mobile homes. In pleading for passage of the amendment, Senator Eagleton emphasized that "mobile homes are now regulated neither as 'vehicles' under the Motor Vehicle Safety Act, nor as housing under local housing codes of most communities. . . ." 118 Cong. Rec. 21898, 21900 (June 21, 1972). Senator Taft, a co-sponsor of a separate bill to set national safety standards for mobile homes under the aegis of HUD, agreed with the wisdom of *some* federal regulation of mobile homes in the following terms:

> The need for establishing federal safety standards for mobile homes cannot be overemphasized. Unlike conventional housing, mobile homes are not subject to local housing ordinances. . . ."

Id. at 21900.

Finally, Senator Brock, the other co-sponsor of the HUD bill, stated:

> If [the Eagleton] amendment were adopted, mobile homes would be the only form of housing con-

[46] 15 U.S.C. § 2075(c).

tained in this legislation, although presently modular homes also are not regulated by local building codes in most parts of the country. . . .

Id. at 21899.[47]

The same theme occurs in other portions of the CPSA legislative history. The original Senate version of the Act, for example, contained the following provision:

> Whenever the Commissioner finds, on the basis of information available to him, that exposure to *an aspect of the household environment other than a consumer product* presents an unreasonable risk of personal injury or death and that *a recognized building, electrical, or other code covers that aspect of the household environment, he may recommend to the appropriate code-making authority*, and to those authorities responsible for enforcing the code *having jurisdiction over that aspect, the code changes he considers warranted* to reduce the risk to a reasonable level. (Emphasis added)

On September 27, 1972, Senator Magnuson reminded the Senate of the relationship between this provision and the then proposed Housing Act of 1972 which, among other things, created a National Institute of Building Sciences:

> It is intended that the Commissioner, in exercising this authority to make recommendations to code authorities, would consult with the National Institute of Building Sciences, when, and if, it is established. The close consultation intended should provide for a coordinated Federal approach to housing-related codes at the State and local level. This consultation will also be valuable to the Commissioner of Product Safety by making available *a more specialized expertise in construction technology than is likely to characterize the Food, Drug, and Consumer Product Agency which will have its expertise in other areas.* 118 Cong. Rec. 32496-97. (Emphasis added)

[47] The Eagleton amendment was defeated by a vote of 63 to 16.

The above-quoted provision of the Senate version was contained in the section of the statute relating to the collection and dissemination by the Commission of product hazard information. The House version of this Section, which did not contain a similar provision, was ultimately adopted by the Conference Committee but the circumstances of this decision do not suggest that the Committee had a differing view about the effect of the Act on existing building codes. To the contrary, subsequent action of the Congress confirms that federal preemption of "consumer product" safety was not intended to intrude upon matters traditionally addressed in building codes.

Public Law 93-383, known as the Housing and Community Development Act of 1974, contained both the Mobile Home Act and provisions establishing a National Institute of Building Sciences. While federal regulation (albeit outside the CPSC) was considered appropriate in the case of mobile homes, which remain moving over the highways and in commerce long after their sale to a consumer, Congress acted quite differently with regard to housing design and construction. The function of the National Institute of Building Sciences is essentially to develop "nationally recognized performance criteria" for building homes, to coordinate its research and development activities with other public and private agencies, and, finally, to *encourage* local authorities to adopt developed standards. 12 U.S.C. § 1701j-2(e). Preemption of local regulation has no role in the federal statute. Indeed, the statute is very explicit in restricting the Institute's authority to impose its standards upon local governments:

> The Institute in exercising its functions and responsibilities . . . shall (A) give particular attention to the

> development of methods for encouraging all sectors of the economy to cooperate with the Institute and to accept and use its technical findings, and to accept and use the nationally recognized performance criteria, standards, and other technical provisions developed for use in Federal, State, and local building codes and other regulations which result from the program of the Institute. . . . (12 U.S.C. § 1701j-2 (e) (3))

This advisory and hortatory role stands in sharp contrast with the preemptive federal regulation effected by the Consumer Product Safety Act and the Mobile Home Act.

Kaiser points out that the composition and method of installation of branch circuit wiring is almost universally regulated by state and local building codes relating to the design and construction of residential dwellings. The Commission does not contend otherwise. Rather, it places its primary reliance on an October 18, 1973 letter to the Chairman of the Commission from two Senators and one Congressman who played key roles in the passage of the CPSA. This letter expresses the opinion that "aluminum wire" is within the scope of the Commission's jurisdiction. I, of course, accept this letter as reflecting the considered and informed opinion of its authors. The views of individual legislators as reflected in legislative history is of relevance in statutory interpretation, however, because it reveals the context in which the legislature has made its corporate decision. Given this rationale, subsequently authorized opinions of individual legislators should not be accorded the same weight as interpretations reflected in the record before the legislature at the time of its deliberations.[48]

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[48] In *Epstein* v. *Resor*, 296 F. Supp. 214 (N.D. Cal. 1969), an affidavit of Congressman Moss specifying his intent as a co-author of the Administrative Procedure Act was rejected for just such reasons. 296 F. Supp. at 216.

Based upon the wording of the Congressional definition of a consumer product and the legislative history to which I have thus far been referred, I conclude that Kaiser has a reasonable probability of success on its claim that the Commission lacks jurisdiction over aluminum branch circuit wiring.

2. *Kaiser's Attack On The Content Of The Commission's Releases.*

Kaiser's attack on the Commission's releases regarding aluminum branch wiring is summarized in its Reply Brief as follows:

> As Plaintiff demonstrated in its initial Memorandum, the Commission has released information in a manner which has led the public to believe that it has collected meaningful statistical evidence of a significant hazard associated with aluminum wiring. It has also misled the public into believing that final determinations about the safety of aluminum wiring have been made. When these disclosures were made, the Commission was fully aware that its alleged incident reports were studded with inaccuracies, that they were almost completely unverified, and that even if they were correct they were statistically meaningless in light of the overall number of home wiring fires occurring each year. It was also aware that no final determination about the degree of risk (if any) posed by aluminum wiring systems had been made.

It would unduly lengthen this Opinion to set forth all of the facts relied upon by Kaiser in support of these contentions. Three examples will suffice to convey the gist of Kaiser's charges.

A Commission survey has indicated that during one twelve-month period, there were approximately 167,000 household fires traceable to electrical wiring. Most homes are wired with copper. The 500 "incidents" repeatedly cited by the Commission occurred over an eight year period so that the average per year would be approximately 65. In this context, Kaiser maintains, 65 "incidents" (not all of them fires) involving aluminum wiring have "no significance whatever". Kaiser's conclusion in this respect is similar to that of the National Bureau of Standards:

> . . . The existing field data are of neither sufficient quality nor sufficient quantity to make statistically defensible estimations of the nature and extent of aluminum wire use or of the level of risk to consumers of such use.[49]

Second, the Commission's references to 179 "Hotline" reports of hazardous conditions is said to be misleading because the Commission failed to note, in each instance, that the calls were prompted by an article in a newspaper which contained the following passage:

> If the Commission ever decides to order some member of the industry to pay for corrective action, your report will have let the Commission know about your house.[50]

Third, Kaiser asserts that the Commission's slipshod approach to its task is demonstrated by its inclusion in the 500 "incidents" figure of 109 incidents reported, directly or indirectly, by local fire officials. Kaiser notes

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[49] "Hazard Assessment of Aluminum Electrical Wire in Residential Use", National Bureau of Standards (December, 1974) [hereafter "Hazard Assessment"] at 39.

[50] "Hazard Analysis/Aluminum Wiring", U.S. Consumer Safety Commission (Bureau of Epidemology) (April, 1975), [hereafter "Hazard Analysis"] at 10.

that the Commission's own analysts have called into question the objectivity [51] of this group and the qualifications [52] of its members where electrical fires are concerned. Kaiser cites the Commission's experience with the fire marshals from Fountain Valley, California, as one specific example of the unreliability of data from this source. These two men had stated to the Commission that aluminum wiring had been involved in all 26 incidents they had reported. When Commission investigators attempted to verify the information, however, they could find no record at all of some of the reported incidents; of those records which were found, five made no mention at all

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[51] Concerning the general reliability of local fire officials, the Technical Analysis Division of the National Bureau of Standards stated:

> On the part of inspectors and others, perceptions of individual cases and recollection of groups of cases are necessarily preconditioned by opinions based on their own prior experiences and on reports of others. Thus, once an inspector has formed the opinion that aluminum wiring is a fire hazard, the mere presence of aluminum wiring at the scene of a fire may induce him to attribute the fire to that wiring. Furthermore, when asked to estimate numbers of fires caused by aluminum wiring he may overestimate the number and/or include all the incidents that he perceives to have potential fire conditions.

Aff. of J. J. Cashel in support of plaintiff's motion, Doc. No. 6, Exh. B at 23.

[52] Concerning fire investiations, the Technical Analysis Division of the National Bureau of Standards had the following to say:

> . . . [M]ost fire departments do not have fire investigators who are also trained or experienced in electrical matters. . . . Many fire departments have no trained investigators specifically for electrical fires. Thus, it is commonly accepted that some of the fires identified as electrical did involve some piece of electrical equipment, but not necessarily as a cause. Second, it is reported by these sources that fires of unknown origin are sometimes called electrical and that investigation reports are sometimes written without an on-the-scene investigation having actually taken place. . . .

Aff. of J. J. Cashel, Doc. No. 6, Exh. 8 at 22.

of aluminum wiring. The Commission's approach was to simply remove these five incidents from the total and to accept the balance *in toto*.

In accordance with its view of the law, Kaiser has pressed this critique of the Commission's releases in support of its argument that the Commission has violated Section 6(b)(1). As earlier indicated, however, it is the Court's view that any *pendente lite* relief premised on the Commission's public releases would require a finding that the Commission, in making those releases, has acted arbitrarily, capriciously, or in abuse of its discretion. The parties have not briefed this issue, however, and I am not convinced that it is the same issue which would be posed if Section 6(b)(1) were applicable.[53] This fact, together with the conclusion hereafter reached regarding Kaiser's claim to irreparable injury, leads me to the conclusion that the Court should not now pass on Kaiser's likelihood of success on the merits in this area.

B. *Irreparable Injury.*

Kaiser has shown that its aluminum branch wiring sales have significantly declined during the period of the challenged Commission activities. The Commission's suggestion that this is attributable to a decline in housing starts during this period is undoubtedly true in part, but I consider it more probable than not that Kaiser has

[53] I doubt, for example, whether the cited APA provision would warrant a court in subjecting Commission releases to the same scrutiny as a prospectus in a securities case. Arguably, however, the Commission should be required to show some basis in fact, for suggesting that a hazard may exist. Wholly apart from the reliability of the reports of "incidents" and their statistical significance, the Commission's "Fact Sheet" suggests that it believes the physical properties of aluminum wire provide a basis in fact for suggesting, that a hazard may exist. While Kaiser disputes the Commission's theory, the present record does not provide a satisfactory basis for evaluating the Commission's contention.

suffered substantial loss as a result of the Commission's actions in the aluminum branch wiring area.

The sole purpose of a preliminary injunction is to prevent irreparable injury during the period from its entry until the final disposition of the case. Moreover, the future irreparable injury to be prevented must be injury which the plaintiff will suffer as a result of conduct likely to be held illegal. Kaiser's past injury from the Commission's press releases is, accordingly, relevant only to the extent it suggests that there will be future injury from that or a similar source. Moreover, in the context of this case, the Court believes it must be careful to distinguish injury likely to arise from the exercise of the Commission's information function and injury likely to arise from the Commission's legislative activities.

On November 4, 1975, the Commission found and announced to the public that it had preliminarily determined "that aluminum wire systems as defined . . . [in the Notice of the Section 7 proceeding] present an unreasonable risk of injury." Kaiser's affidavits from some thirteen experienced electrical contractors suggest that it is this finding and the resulting proceedings which are at the root of Kaiser's present problems[54] and I am not convinced that Kaiser will suffer any irreparable injury of the Commission's past or future public releases which it would not in any event suffer as a result of the Commission's standard development proceedings.

Put another way, I am unpersuaded that any preliminary injunctive relief, at least any relief short of an order vacating the notice and aborting the standard development proceeding, would prevent the future irreparable

[54] The one local ordinance in the record which bans the use of aluminum wiring and makes reference to the CPSC adverts to the CPSC's "determinations of unreasonable risk" and not to the Commission releases *per se*. Aff. of J. J. Cashel in Support of Motion, Doc. No. 7, Exh. "R".

injury which Kaiser fears, and Kaiser perhaps, recognizing the implications of an order aborting the Commission's proceedings, has not asked for relief of that stripe. While Kaiser is, of course, not foreclosed from hereafter requesting such relief, I think it apparent that the propriety of that relief would involve a balancing of interests far different from anything that has thus far been argued to the Court. While the Court has made a preliminary determination that the Commission lacks jurisdiction in the area of aluminum branch wiring, that determination is preliminary only. Any application to enjoin the Commission's proceedings would, among other things, necessarily entail consideration of the public interest in avoiding a possibly unjustified delay in the administrative formulation of a safety standard which is perhaps needed.

In short, Kaiser has not demonstrated that it faces irreparable injury which the Court can avoid by granting the *pendente lite* relief it seeks. For this reason, its motion for a preliminary injunction will be denied.

APPENDIX E

Section 3(a)(1) of the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(1), provides that for purposes of the Act:

> "(1) The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—
>
> "(A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,
>
> "(B) tobacco and tobacco products,
>
> "(C) motor vehicles or motor vehicle equipment (as defined by sections 102(3) and (4) of the National Traffic and Motor Vehicle Safety Act of 1966 [15 U.S.C. 1391(3) and (4)],
>
> "(D) pesticides (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 et seq.]),
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> "(E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1954 [26 U.S.C. 4181] (determined without regard to any exemptions from such tax provided by section 4182 or 4221, or any other provision of such Code), or any component of any such article,
>
> "(F) aircraft, aircraft engines, propellers, or appliances (as defined in section 101 of the Federal Aviation Act of 1958 [49 U.S.C. 1301]),

"(G) boats which could be subjected to safety regulation under the Federal Boat Safety Act of 1971 (46 U.S.C. 1451 et seq.); vessels, and appurtenances to vessels (other than such boats), which could be subjected to safety regulation under title 52 of the Revised Statutes or other marine safety statutes administered by the department in which the Coast Guard is operating; and equipment (including associated equipment, as defined in section 3(8) of the Federal Boat Safety Act of 1971 [46 U.S.C. 1452 (8)]) to the extent that a risk of injury associated with the use of such equipment on boats or vessels could be eliminated or reduced by actions taken under any statute referred to in this subparagraph,

"(H) drugs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321(g), (h), and (i)]), or

"(I) food. The term "food", as used in this subparagraph means all "food", as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321(f)], including poultry and poultry products (as defined in sections 4(e) and (f) of the Poultry Products Inspection Act [21 U.S.C. 453(e) and (f)], meat, meat food products (as defined in section 1(j) of the Federal Meat Inspection Act [21 U.S.C. 601(j)]), and eggs and egg products (as defined in section 4 of the Egg Products Inspection Act [21 U.S.C. 1033]).

"Except for the regulation under this chapter or the Federal Hazardous Substances Act [15 U.S.C. 1261 et seq.] of fireworks devices or any substance intended for use as a component of any such device, the Commission shall have no authority under the functions transferred pursuant to section 2079 of this title to regulate any product or article described in subparagraph (E) of this

paragraph or described, without regard to quantity, in section 845(a)(5) of title 18. See sections 2079(d) and 2080 of this title, for other limitations on Commission's authority to regulate certain consumer products."

No. 77-1826

In the Supreme Court of the United States

OCTOBER TERM, 1978

KAISER ALUMINUM & CHEMICAL CORPORATION, PETITIONER

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 574 F. 2d 178. The principal opinion of the district court (Pet. App. 1c-10c) is reported at 428 F. Supp. 177. An earlier opinion of the district court (Pet. App. 1d-34d) is reported at 414 F.Supp. 1047.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2b) was entered on March 27, 1978. The petition for a writ of certiorari was filed on June 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether aluminum branch circuit wiring is a "consumer product" within the meaning of the Consumer Product Safety Act.

STATEMENT

In November 1973 the Consumer Product Safety Commission ("Commission") began an investigation into the safety of residential electrical wiring systems using aluminum conductors, following reports of house fires alleged to have been caused by overheating of aluminum conductors. After holding hearings and receiving reports of studies conducted by the National Bureau of Standards, the Commission determined that aluminum wire of gauge 10 and smaller presented an unreasonable risk of injury to consumers through overheating and subsequent risk of fire, and it issued a notice of proposed rulemaking under Section 7(b) of the Consumer Product Safety Act, 86 Stat. 1213, as amended, 15 U.S.C. 2056(b), to establish standards for aluminum wire and devices.[1]

Petitioner, a manufacturer and distributor of aluminum branch circuit wire, brought this suit in the United States District Court for the District of Delaware to enjoin the Commission from disseminating information about the hazards of aluminum wire and to require the Commission to retract statements it had previously issued. Petitioner alleged that the Commission had no authority to release such information because aluminum wire is not a "consumer product" within the meaning of the Consumer Product Safety Act ("Act").[2]

The district court, after trial, held (Pet. App. 1c-10c) that the Commission does not have jurisdiction over

[1]40 Fed. Reg. 51218.

[2]The district court severed this jurisdictional claim for immediate trial after denying petitioner's motion for a preliminary injunction and the Commission's motion to dismiss (Pet. App. D).

aluminum branch circuit wiring and wiring systems because, by restricting the Act to those products used "in or around" a home, "Congress has affirmatively expressed its intention that this type of housing regulation remain in the class of police powers reserved to the States * * *" (Pet. App. 10c).

The court of appeals reversed (Pet. App. 1a-10a). It found that branch circuit wiring fits within the plain language of the Act, which defines a consumer product as "an 'article', or component part thereof, produced or distributed * * * for the personal use * * * or enjoyment of a consumer in or around a * * * household or residence' " (Pet. App. 5a). Moreover, the court found "persuasive evidence" in the legislative history to support the view that aluminum wiring is included within the Act's coverage (Pet. App. 9a-10a).

ARGUMENT

The decision of the court of appeals is correct. This decision of first impression does not conflict with any decision of this Court or any other court of appeals, and in the absence of a conflict concerning the scope of the Commission's powers there is no reason for review by this Court.

1. The court of appeals properly concluded that the plain language of the Consumer Product Safety Act gives the Commission authority to call public attention to the dangers of aluminum wiring. Such wiring is a "consumer product" within the statutory definition, *i.e.*, an " 'article * * * produced or distributed * * * for the personal use * * * or enjoyment of a consumer in or around a * * * household or residence' * * *." As the court of appeals stated, "[N]othing in the plain language of the Act suggest[s] that the word 'article', a noun denoting any material thing, excludes components incorporated in a residence if they otherwise fit within the definition" (Pet. App. 5a-6a).

Wiring and wiring systems plainly are "used in" a household or residence every time a light switch or an appliance is turned on,[3] and the wiring is no less "in" a home because it is embedded in the walls.

2. Because aluminum branch circuit wire is within the plain meaning of the statutory definition of consumer products and is not among the categories of products specifically excluded from the Act's coverage (15 U.S.C. 2052(a)(1)(A)-(I)),[4] it should be held to be a consumer product unless Congress clearly intended to exclude it from the Act's reach. See *United States* v. *Bisceglia*, 420 U.S. 141, 150; *United States* v. *American Trucking Associations*, 310 U. S. 534, 543-544. That is not the case here. In fact, as the court of appeals found, the legislative history provides "persuasive evidence" that Congress intended the Act to include articles such as aluminum wire (Pet. App. 9a).

In the first place, the Act had its origins in the work of the National Commission on Product Safety, which was created by Congress in 1967 to identify categories of

[3]Electrical wiring and devices conduct electrical current. As the court of appeals noted (Pet. App. 6a), electrical appliances could not function without the wire and the current. Moreover, the wiring is easily accessible to consumers at wall outlets and switches; consumers personally handle the wiring system and its components when installing light fixtures, adding new electrical receptacles, or installing new circuits to existing junction boxes.

[4]Both the district court and the court of appeals properly rejected petitioner's argument that aluminum branch circuit wiring falls within the so-called "industrial exclusion" to the statute, 15 U.S.C. 2052(a)(1)(A) (Pet. App. 6a-8a; 3c-6c). Branch circuit wiring (either copper or aluminum) is or has been sold directly to consumers by the nation's largest retailer, Sears, Roebuck and Co., the nation's largest retailer of building supplies, Wickes Lumber, and others (Pet. App. 4c-6c and nn. 5-11).

unsafe and unregulated household products.[5] That Commission's final report[6] listed approximately 350 largely unregulated "consumer products," including "electrical outlets, built-in wiring devices, and distribution systems." Final Report of the National Commission in Product Safety, p. 90 (June 1970).

In the House floor debates on the Consumer Product Safety Act, Representative Moss, the subcommittee chairman, specifically cited aluminum wiring as a matter of concern:

> Should any member think that the list of hazards compiled by the [National Commission on Product Safety] was a final and exhaustive list, I would recommend that he carefully read the hearings of the subcommittee on this legislation. Very serious questions were raised concerning the safety of many products not investigated by the Commission, such as children's minibikes, aluminum home wiring and synthetic football turf.

118 Cong. Rec. 31378 (1972)[7]

Legislation enacted after the court of appeals' decision confirms that it correctly read the Act. On July 11, 1978, Congress amended the Act to require the Commission to

[5]81 Stat. 466, 467.

[6]Reprinted in Hearings on H.R. 8110, H.R. 8157, H.R. 260 (and identical bills), H.R. 3813 (and identical bills) before the House Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, 92d Cong., 1st and 2d Sess. 319 (pt. 2) (1972).

[7]The Act is a broad remedial statute, intended to rectify the previous piecemeal approach to product safety legislation. *E.g.*, 118 Cong. Rec. 21851, 31375 (1972); S. Rep. No. 92-749, 92d Cong., 2d Sess. 12 (1972); S. Rep. No. 92-835, 92d Cong., 2d Sess. 7 (1972).

The Committee Reports demonstrate that the definition of "consumer product" is to be interpreted broadly. S. Rep. No. 92-749, 92 Cong., 2d Sess. 12 (1972); H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 27 (1972).

adopt an emergency interim safety standard for cellulose home insulation because of the fire and corrosion hazards it poses.[8] The House Report on this amendment stated that the Commission "presently has the authority to promulgate a mandatory safety rule for home insulation." H.R. Rep. No. 95-1116, 95th Cong., 2d Sess. 3 (1978). See also 124 Cong. Rec. H3980 (daily ed. May 16, 1978), 124 Cong. Rec. S10131 (daily ed. June 29, 1978). Because insulation, like aluminum wire, is sold to consumers for their use as well as installed inside the walls of a house as an integral part of a house, the 1978 amendment and its legislative history refute petitioner's contention (Pet. 5-6) that housing and building materials are beyond the Act's scope.[9] The recent legislation confirms the basis on which Congress acted in 1972, and it therefore has considerable significance. See *Califano* v. *Sanders*, 430 U.S. 99; *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255, 267.

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[8]Emergency Interim Consumer Product Safety Standard Act of 1978, Pub. L. 95319, 92 Stat. 386.

[9]The single portion of the Act's history to which petitioner points for support of its position that aluminum wire is not a consumer product is the debate on the Eagleton amendment, an unsuccessful attempt to include mobile homes within the Act's coverage (Pet. 7-10). Petitioner fails to note that, in explaining its intent to exclude mobile homes from the Act's coverage (Pet. 9), the House Committee Report states that "the definition of the term 'consumer product' would include any component, equipment, or appliance sold with or used in or around a mobile home." H.R. Rep. 92-1153, 92d Cong., 2d Sess. 28 (1972).

Petitioner also focuses on subsequently enacted, unrelated legislation, which has no bearing on the issue presented here (Pet. 10-13). The fact that other legislation has created advisory bodies in the area of housing (Pet. 10-11) and fire prevention (Pet. 11) does not diminish the Commission's authority over consumer products used in or around the household. The definition of "consumer product" in the Magnuson-Moss Warranty Act (Pet. 12) also has no bearing on the Consumer Product Safety Act. In any event, the Federal Trade Commission, which administers the Warranty Act, has announced that products such as wiring which go into the construction of a dwelling are consummer products when sold by retailers. 42 Fed. Reg. 36115.

3. The court of appeals' decision is consistent with the only other decisions addressing the Commission's authority to regulate aluminum branch circuit wire. See *United States* v. *Anaconda Co.*, 445 F. Supp. 486 (D. (D. D.C.), appeal pending, C.A. D.C., No. 77-1628 (*Anaconda I*), and *Consumer Product Safety Commission* v. *Anaconda Co.*, 445 F. Supp. 498 (D. D.C.), appeal pending, C.A. D.C., Nos. 78-1054, 78-1070 (*Anaconda II*) (argued May 5, 1978).[10] Moreover, the Commission's interpretation of the Act it administers was adopted only one year after the passage of the Act. As an essentially contemporaneous construction of the statute, which Congress has recently endorsed (see pages 5-6, *supra*), it is entitled to great deference. *Zenith Radio Corp.* v. *United States*, No. 77-539, decided June 21, 1978, slip op. 6-7.

4. Contrary to petitioner's contention (Pet. 5), the decision below raises no issue of federalism. As the court of appeals properly concluded (Pet. App. 8a), petitioner's assertion that Congress intended to defer to state and local authorities on all matters of building materials and design of housing components is at odds with Sections 26(a) and 2(a)(4) of the Act, 15 U.S.C. 2075(a) and 2051(a)(4). In those Sections, Congress declared that existing state regulation was inadequate and that federal consumer product safety standards should preempt conflicting local regulations. Thus, Congress was aware of the extent to which it might enter into areas previously regulated by the states. Petitioner does not dispute congressional authority to do so, and in fact suggests that

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[10]There is no reason to defer consideration of this petition pending the outcome of the appeals in the *Anaconda* cases, as petitioner suggests (Pet. 20). If the court of appeals' decisions in those cases conflict with the result here, and if that conflict is not resolved by this Court, there will be time enough for petitioner to raise its collateral estoppel arguments before the district court on remand of those cases.

agencies with such a mandate already exist (Pet. 6).[11] Because one of the purposes of the Act is "to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations," 15 U.S.C. 2051(b)(3), petitioner's contention that the Commission's actions disrupt federal-state relations is insubstantial. Cf. *United States* v. *Culbert*, No. 77-142, decided March 28, 1978, slip op. 9.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1978.

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[11]To the extent petitioner attacks the Commission's ability to regulate consumer products, including aluminum wiring, it is simply expressing disagreement with the wisdom of the legislative plan, and its proper recourse is to seek an amendment to the Act.

[12]In denying the Commission's motion to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted (Pet. App. 1d-23d), the district court held that it had jurisdiction under 28 U.S.C. 1331 and 1337 (*id.* at 11d and n. 19), and that dismissal would be inappropriate (*id.* at 19d-22d). The Commission does not concede that these decisions were correct and, if this Court grants the petition for certiorari, the Commission will argue that they were wrong. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n. 8.

No. 77-1826

IN THE

Supreme Court of the United States

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Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES IN SUPPORT OF PETITION FOR A WRIT CERTIORARI

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June 26, 1978

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Amicus National Association of Home Builders adopts petitioner's statements of Opinions Below, Jurisdiction, Question Presented, Statutory Provision Involved and Statement of the Case.

INTEREST OF AMICUS

This Amicus Curiae brief is respectfully submitted by the National Association of Home Builders of the United States ("NAHB"), with the consent of all the parties to this case, pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States. NAHB is a professional trade association representing the home building industry. With its 678 affiliated state and local associations and over 103,000 members, NAHB is the voice of America's housing industry.

As the representative of the housing industry, NAHB is obliged to express its views on the significance of this case and to urge the Court to accept it for review. NAHB has consistently supported sound and comprehensive home construction techniques. For example, in 1964 we established the NAHB Research Foundation, Inc., a wholly owned subsidiary to test new and innovative construction techniques. The association and its state and local affiliates have also endorsed uniform building and construction codes across the country. However, NAHB's interest in a sound and coherent system of home construction regulation will be severely affected if the decision of the Court of Appeals below is not reversed.

ARGUMENT

When Congress created the Consumer Product Safety Commission ("CPSC"), it limited the agency's regulatory authority to "consumer products." 15 U.S.C. § 2052(a). As the petition of Kaiser Aluminum & Chemical Corporation demonstrates, nothing in the language or legislative history of the Consumer Product Safety Act, 15 U.S.C. §§ 2051, *et. seq.* ("Act"), shows that Congress intended the CPSC to assume a role in the regulation of home construction. Indeed, if anything had occurred during the legislative process to indicate that Congress was considering the creation of a new federal agency to write and enforce national building standards and codes, NAHB and other representatives of the home construction industry would undoubtedly have been active in opposing such involvement in a matter traditionally left to state and local government.

Since 1974, NAHB has repeatedly voiced its concern over the CPSC's attempts to regulate housing construction.[1] NAHB is especially concerned that the decision of the Third Circuit, if left intact, will disrupt the comprehensive and effective system of regulating housing construction that state and local authorities have painstakingly developed over the past several

[1]In particular, NAHB's Committees on Building Codes and Consumer Protection have consistently opposed the CPSC's attempts to regulate aluminum branch circuit wiring systems, and passed resolutions to that effect in September 1974 and January 1978, respectively.

decades. Such federal involvement in traditionally state and local matters is not only highly inappropriate in the absence of any explicit Congressional mandate to that effect, *see, e.g., United States v. Bass,* 404 U.S. 336, 349 (1971); *Palmer v. Massachusetts,* 308 U.S. 79, 84 (1939), but will lead to serious and unjustified dislocations in the home construction industry.

First, this is not an area where a federal agency is trying to enter an unregulated field that has "traditionally been left to," but in fact has been ignored by, state and local governments. On the contrary, home construction has long been one of the most highly regulated of industries. Moreover hundreds of state and local government units over the years have developed the needed expertise and devoted the necessary resources to assure that the homes which are built will be safe. State and local governments establish design and construction standards through building codes, issue building permits, license builders, electricians, plumbers and other craftsmen, inspect newly-constructed homes, and enforce this entire range of regulatory requirements. *See generally,* R. Sanderson, *Codes and Code Administration* (1969).[2] In short, a system which both establishes and enforces codes and standards exists today and there is simply no good reason for the CPSC to thrust itself into the housing construction area.

In fact, there are some very good reasons why the CPSC should *not* become involved. The existing state and local regulatory authorities have the experience and manpower

[2]With respect to electrical wiring systems, for example, the existing state and local regulatory scheme encompasses: (1) the design and installation requirements of the National Electrical Code, which are usually adopted by state and local authorities either directly or through model building codes, such as the Uniform Building Code, the Building Officials Code Administrators, or the Standard Building Code; (2) licensing requirements for electricians; and (3) the inspection of completed wiring systems in individual homes.

Significantly, in view of the CPSC's allegations concerning aluminum wiring systems, the National Electrical Code has been amended to include special design and installation requirements for such systems. *See* National Electrical Code, arts. 110-14, 210-7(G) and 380-14(a) (4) (1978 ed.)

necessary to operate an effective housing construction program, whereas the CPSC possesses neither the necessary expertise nor the reasonable expectation of acquiring it. As an indication of the extent to which the CPSC's reach exceeds its grasp, over 1.98 million residential units were constructed in this country in 1977, including nearly 1.45 million single-family residences.[3] Since the CPSC has only 900 full-time employees,[4] the agency cannot even attempt to inspect every new home, much less set all the necessary design and performance standards, issue all the necessary building permits, and supervise the necessary professional licensing processes, as well as regulate the multitude of true "consumer products."

However, once the CPSC purports to regulate any "risk" associated with an item over which it claims jurisdiction, all state and local authority to impose any requirement other than one identical to the rule dictated by the CPSC would be explicitly displaced by the preemption provisions of the Act. *See* Section 26(a), 15 U.S.C. § 2075(a). If, for example, the CPSC purported to deal with the "risk" of electrical wiring fires, it is far from clear that any state or local electrical code requirement—even one dealing with quite a different aspect of electrical installations—would still be valid. This potential danger for disruption of the existing regulatory system is particularly acute since, as we have indicated, the CPSC lacks both the expertise and the resources to make certain that it does not, perhaps inadvertently, open up large and dangerous gaps in the state and local regulatory system.

Furthermore, the entry of this inexpert agency into the housing construction area will engender widespread uncertainty among state and local regulatory authorities, which will not know exactly how particular CPSC regulations will affect their powers.[5] Even more important, from NAHB's perspective, is

[3] *See* United States Department of Commerce, Bureau of the Census, *Construction Reports*, Series C-20 (1978).

[4] *See* the CPSC's *Annual Report for Fiscal Year 1977* at 5 (1978).

[5] The CPSC has already formulated glazing standards for architectural glass which are not consistent with the same requirements in the state and local building codes. The state and local building officials, generally, continue to enforce their own rather than adopt and enforce the CPSC standards which have no enforcement mechanism provisions.

the fact that home builders may soon be faced with numerous conflicts between CPSC standards for the design of building materials and state and local standards governing their utilization during the construction process.[6] Once again, the CPSC's enabling legislation provides no answer to this conflict of obligations. This silence is a powerful indication that Congress did not intend to create such a conflict.

The CPSC is claiming an apparently universal jurisdiction over everything with which the consumer may conceivably come in contact, including housing and housing components such as electrical wiring systems, architectural glass and roofs.[7] The CPSC has taken the position that housing and building components are "consumer products" to be treated in the same manner as toasters and lawn mowers. Basic housing components, such as wiring, ductwork, wallboard, bricks and flooring, were never intended to be subject to regulation under the Act. To allow the CPSC to assert jurisdiction in the housing construction area would impose an unconscionable burden on homebuilders who constructed homes in complete conformance with applicable state and local building codes and other regulations.

In summary, NAHB believes that the CPSC's assertion of authority over housing construction, as approved by the Third Circuit, has very serious implications for all aspects of the home construction process. The seriousness and immediacy of the problem warrants the attention of this Court.

[6] *See* Kaiser's Petition at 15-18.

[7] *See, e.g.*, 42 Fed. Reg. 1428 (1977); Record of CPSC action concerning "[w]hether certain prefabricated panels made of a combination of asbestos and cement used on residences and schools in Puerto Rico are consumer products" (June 30, 1977).

CONCLUSION

For the reasons stated above, NAHB respectfully requests the Court to issue a writ of certiorari to review the decision of the Court of Appeals below.

Respectfully submitted,

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